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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 555

STATE OF WASHINGTON EX REL. THE WASHINGTON WATER POWER COMPANY, A CORPORATION, CITY BANK FARMERS TRUST COMPANY, A CORPORATION, AND RALPH E. MORTON, AND CHELAN JOINT SCHOOL DISTRICT NO. 129, A MUNICIPAL CORPORATION, AND TOWN OF CHELAN, A MUNICIPAL CORPORATION,

Appellants,

vs.

THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR CHELAN COUNTY, HONORABLE FRED KEMP, JUDGE,

Appellee

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

STATEMENT AS TO JURISDICTION

I. Nature of Case and Statutory Provisions Sustaining Jurisdiction

This is an appeal under Title 28, United States Code, Section 1257 (2), from a final judgment of the Supreme Court

of Washington entered the 6th day of September, 1949. The facts in the case may be briefly stated as follows:

On October 30, 1945, Public Utility District No. 1 of Chelan County instituted an eminent domain proceeding to condemn public utility property belonging to The Washington Water Power Company, a corporation. A large part of the property sought to be condemned consisted of a generating plant located on lands owned by the United States Government and maintained and operated by The Washington Water Power Company under a license granted by the Federal Power Commission. The Washington Water Power Company, and City Bank Farmers Trust Company, a corporation, and Ralph E. Morton, the two trustees under the terms of a mortgage and bond issue previously made by The Washington Water Power Company on the property involved in the condemnation suit, were the original respondents named by the petitioner in eminent domain. After the suit was started and before the hearing upon petitioner's application for a decree of public use and necessity, Chelan Joint School District No. 129, a municipal corporation, and Town of Chelan, a municipal corporation, were each permitted to intervene in said eminent domain proceeding. After the aforesaid interventions were authorized by the Superior Court, said eminent domain proceeding was entitled, "Public Utility District No. 1 of Chelan County, a municipal corporation, petitioner, vs. The Washington Water Power Company, a corporation, City Bank Farmers Trust Company, a corporation, and Ralph E. Morton, Respondents, and Chelan Joint School District No. 129, a municipal corporation, Intervener, and Town of Chelan, a Municipal Corporation, Intervener", and numbered 15728 in the files of the County Clerk of Chelan County, Washington. As such interveners the two municipal corporations last named joined with the original respondents in opposing

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the granting of the application for a decree of public use and necessity.

The Honorable Fred Kemp, Judge of the Superior Court of the State of Washington, for Chelan County, heard the testimony offered in support and in opposition to granting the decree of public use and necessity, and on November 19, 1948, made and entered a decree of public use and necessity. This decree adjudged the contemplated taking by the petitioner, Public Utility District No. 1 of Chelan County, of the property sought to be condemned and the severing of same from the remaining property of the respondent, The Washington Water Power Company, and the damaging, if any, of property incident thereto, to be necessary in the carrying out of the system or plan specified and adopted in and by Resolution No. 51 of said Public Utility District No. 1 of Chelan County, adopted October 18, 1945. It also adjudged that the contemplated use for which said real and personal property is sought to be taken to be a public use.

Under the laws of the State of Washington, such a judgment as made by the trial court is a final judgment unless review thereof be taken to the Supreme Court after the entry of such judgment.

> *State ex rel. Northwestern Electric Co.* v. *Superior Court,* 27 Wash. 2nd 694, 698.

Pursuant to an application therefor by the above named appellants, the Supreme Court of the State of Washington granted a writ of review of the said eminent domain proceeding, entitled, "State of Washington ex rel. The Washington Water Power Company, a corporation, City Bank Farmers Trust Company, a corporation, and Ralph E. Morton, and Chelan Joint School District No. 129, a municipal corporation, and Town of Chelan, a municipal corporation, plaintiffs, vs. The Superior Court of the State of

Washington for Chelan County, Honorable Fred Kemp, Judge, Defendant", and numbered 30837 in the files of the Clerk of the Supreme Court of the State of Washington. The writ of review so issued directed the Honorable Fred Kemp, Judge of the Superior Court of the State of Washington, for Chelan County, to certify and file with the Clerk of the Supreme Court of the State of Washington, a full, true and complete transcript of the entire record of the above entitled eminent domain proceeding, and of all the proceedings in said Case No. 15728, including the Bill of Exceptions containing all the evidence adduced or presented in the said cause. The writ of review was duly complied with by the Honorable Fred Kemp and after a review of the proceedings in said eminent domain cause, and a hearing thereon by the Supreme Court of the State of Washington, that court filed an opinion on July 21, 1949, declaring the judgment of the trial court to be correct and affirming its action upon the application for a decree of public use and necessity. Thereafter appellants applied for rehearing, which was denied by said Supreme Court of the State of Washington on the 6th day of September, 1949, on which date the judgment of the Supreme Court was made and entered affirming the judgment of the trial court in entering the decree of public use and necessity.

Under the laws of the State of Washington the condemnation sought by means of the above entitled eminent domain proceeding would have failed had the decree of public use and necessity been denied. The laws of the State of Washington under which the said eminent domain proceeding was instituted and pursued, required that the system or plan of operation of the property sought to be condemned must be set forth in a resolution to be attached to and made a part of the petition in eminent domain. Appellants contended that the because the plan or system of operation to which the

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property would be subjected, was thus shown by the petition in eminent domain to be in violation of the Federal laws, that to construe and apply State laws to permit condemnation under a plan of operation in violation of the United States laws, was to construe such laws as being valid though repugnant to the laws of the United States.

Appellants have at all times contended that those State statutes which are referred to, together with summaries of pertinent provisions thereof, under the heading of this Jurisdictional Statement entitled, "State Statutes the Validity of Which is Involved", are repugnant to those Federal statutes the citations and pertinent parts of which are hereafter set forth:

"• • •.

"All licenses issued under this part shall be on the following conditions:

"• • •.

"(h) That combinations, agreements, arrangements, or understandings, express or implied, to limit the output of electrical energy, to restrain trade, or to fix, maintain, or increase prives for electrical energy or service are hereby prohibited.

"• • •."

(Vol. 49, United States Statutes at Large, Sec. 206, p. 842, 844; U.S.C.A. Title 16, Sec. 803 (h).)

"That as a condition of the license, every licensee hereunder which is a public-service corporation, or a person, association, or corporation owning or operating any project and developing, transmitting or distributing power for sale or use in public service, shall abide by such reasonable regulation of the services to be rendered to customers or consumers of power, and of rates and charges of payment therefor, as may from time to time be prescribed by any duly constituted agency of the State in which the service is rendered or the rate charged. That in case of the development,

transmission, or distribution, or use in public service of power by any licensee hereunder or by its customer engaged in public service within a State which has not authorized and empowered a commission or other agency or agencies within said State to regulate and control the services to be rendered by such licensee or by its customer engaged in public service, or the rates and charges of payment therefor, or the amount or character of securities to be issued by any of said parties, it is agreed as a condition of such license that jurisdiction is hereby conferred upon the commission, upon complaint of any person aggrieved or upon its own initiative, to exercise such regulation and control until such time as the State shall have provided a commission or other authority for such regulation and control: * * *."

(Vol. 41, United States Statutes at Large, Sec. 19, p. 1073; U.S.C.A. Title 16, Sec. 812.)

The Supreme Court of the State of Washington held that the State statutes as construed and applied were not repugnant to the above cited Federal Statutes, and therefore were not invalid.

Two of the judges of the Supreme Court of Washington dissented from the opinion affirming the judgment of the trial court and the decree of public use and necessity granted as such judgment, on the ground that upon the issues presented by the Federal questions the order granting a decree of public use and necessity entered by the trial court should be reversed.

II. State Statutes the Validity of Which Is Involved

There was thus drawn in question the validity under Article VI of the Constitution of the United States, of certain statutory provisions of the State of Washington which appellants claimed were repugnant to laws of the United States made in pursuance of the Constitution of the United

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States. The pertinent provisions are appropriately summarized below, the section numbers being those used in Remington's Revised Statutes of Washington, Annual Pocket Parts thereto, and bound Supplements to Remington's Revised Statutes of Washington:

REMINGTON'S REVISED STATUTES, Section 11610, 1945 Supplement, the pertinent provisions of which grant to public utility districts the right of eminent domain and require that it be exercised and instituted pursuant to resolution of the commission and conducted in the same manner and by the same procedure as is or may be approved by law for the exercise of the power of eminent domain by incorporated cities and towns in the State of Washington in the acquisition of utility properties.

REMINGTON'S REVISED STATUTES, Section 11611-1, 1941 Supplement, the pertinent provisions of which require that any resolution of a public utility district providing for the condemnation of any public utility must require that such resolution shall specify and adopt the system or plan proposed and declare the estimated cost thereof, and shall specify whether general obligation or utility revenue bonds are to be issued to defray such costs.

REMINGTON'S REVISED STATUTES, Section 9488, 1940 Pocket Part (in effect at the time the eminent domain proceeding being reviewed by the Supreme Court of the State of Washington was instituted), the pertinent provisions of which grant to cities the right to condemn and purchase plants and facilities for the purpose of furnishing such city or town or the inhabitants thereof electricity for lighting, heating, fuel and power purposes.

REMINGTON'S REVISED STATUTES, Section 9489, 1941 Supplement, the pertinent provisions of which require that the council or other corporate authorities of any city if they

deem it advisable that the city of which they are officers shall acquire any public utility mentioned in Remington's Revised Statutes, Section 9488, 1940 Pocket Part, shall provide therefor by ordinance which shall specify and adopt the system or plan proposed.

REMINGTON'S REVISED STATUTES, Section 9217, the pertinent provisions of which provide whenever an ordinance has been passed by a state legislative authority, the carrying out of which will require that property be taken/or damaged for public use, the public utility shall file a petition with the city or county where the land sought to be condemned is situated, praying that just compensation shall be ascertained for the property to be so taken or damaged.

REMINGTON'S REVISED STATUTES, Section 9218, the pertinent provisions of which require that a petition for condemnation, such as that referred to in Section 9217 above, shall contain a copy of the ordinance providing for the condemnation (which shall specify and adopt the system or plan proposed).

REMINGTON'S REVISED STATUTES, Section 11611-2, 1941 Supplement, the pertinent provisions of which provide that whenever the commission shall deem it advisable to issue revenue bonds for the purpose of defraying the cost of a public utility being condemned, it shall have the power as a part of such plan and system to create a special fund or funds for the purpose of defraying the cost of such public utility, and into which said fund or funds it may obligate and bind the district to set aside and pay a fixed proportion of the gross revenues of such public utility, and to issue and sell utility revenue bonds on warrants payable as to both principal and interest only out of such fund or funds.

REMINGTON'S REVISED STATUTES, Section 11611-3, 1945 Supplement, the pertinent provisions of which provide that

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any resolution creating any such special fund and authorizing revenue bonds payable therefrom may contain covenants, including a covenant for the establishment and maintenance of and charges for electric energy so furnished or supplied by the public utility.

REMINGTON'S REVISED STATUTES, Section 11611-7, 1941 Supplement, the pertinent provisions of which provide that the commission of each district which shall have revenue bonds outstanding shall have the power and shall be required to establish, maintain and collect rates and charges for electric energy which shall be adequate to provide revenue sufficient for the payment of principal of and interest on such bonds, and all payments which the district is obligated to set aside in any special fund or funds created for such purpose.

REMINGTON'S REVISED STATUTES, Section 11611-10, 1940 Supplement, the pertinent provisions of which provide that the issuance of any revenue bonds by a public utility district shall constitute a contract with the holder or holders of such bonds and that the obligation of a public utility district under such resolution or resolutions shall be enforcible by any bondholder by mandamus or by any other appropriate suit or action in any court of competent jurisdiction.

The foregoing Washington Statutes as construed and applied by the Supreme Court of the State of Washington, with two of the judges of said Court dissenting, permitted the condemnation of electrical generating property maintained and operated on Federal lands under a license from the Federal Power Commission, on the ground that the plan or system of operation by the Public Utility District as disclosed by the resolution made a part of the petition in eminent domain, showed that the property was not being taken for the purpose of operating the same under a plan or system which is repugnant to United States Laws.

III. Dates of Judgment and Appeal

Final judgment of the Supreme Court of Washington affirming the judgment of the trial Court, Honorable Fred Kemp, Judge of The Superior Court of the State of Washington for Chelan County, in granting a decree of public use and necessity, plainly sustained the validity of the Washington Statutes above set forth as the same were construed and applied in that aforementioned eminent domain proceeding which was reviewed by the Supreme Court of the State of Washington.

This judgment was entered on September 6, 1949. A petition for appeal to this Court was presented to the Honorable George B. Simpson, Chief Justice of the Supreme Court of Washington, on the 28th day of November, 1949, and was by him allowed the same day.

In treating and referring to the judgment of the Supreme Court of the State of Washington made and entered on September 6, 1949, as a final judgment, counsel for appellants are not unmindful of the following decisions of the Supreme Court of the United States:

Washington ex rel Perry v. *Superior Court of State of Washington for Chelan County*, 276 U. S. 626, 72 L. Ed. 738, 48 Sup. Ct. 320;

Washington ex rel McPherson Bros. Co. v. *Superior Court of State of Washington in and for Douglas County*, 274 U. S. 726, 71 L. Ed. 1335, 47 Sup. Ct. 769;

Grays Harbor Logging Co. v. *Coats-Fordney Logging Co.*, 243 U. S. 251, 61 L. Ed. 702, 37 Sup. Ct. 295.

We are aware that the holding of those cases is that a decree of public use and necessity in an eminent domain proceeding under the Washington statutes and constitution is not a final judgment within the meaning of Section 237, Judicial Code.

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Referring to judgments of the Supreme Court of Washington such as that which appellants are here endeavoring to appeal from, the Supreme Court of the United States has said:

> "• • • they are held reviewable by certiorari, and not by appeal, not because they are final, or are independent of the subsequent proceedings ascertaining the damages, but because in Washington proceedings by appeal are statutory, and no statute has been enacted giving an appeal from the order or judgment determining the questions of use and necessity; by reason of which, the writ of certiorari is employed as a means of exercising the constitutional power of review."
>
> (*State of Washington ex rel Grays Harbor Logging Co.* v. *Superior Court of Washington for Chehalis County*, 61 L. Ed. 702, 705).

Since the statement of the Supreme Court of the United States, the Supreme Court of the State of Washington has considered the question whether a decree of public use and necessity is a final judgment. In the recent case of *State ex rel Northwestern Electric Co., et al.* v. *Superior Court*, 27 Wash. (2), 694, the Supreme Court of the State of Washington held that a decree of public use and necessity in an eminent domain proceeding such as that reviewed by the Supreme Court of the State of Washington in the case at bar, is a final judgment; and in so holding the Supreme Court of Washington said in part:

> "• • •
>
> "Three questions are posed by respondent's motion to dismiss: (1) Was the writ of certiorari in the case at bar issuable as a matter of right and without notice? (2) Is the order or decree of public use and necessity in the case at bar a final judgment, appeal from which, or review of by certiorari, required to be perfected

within thirty days? (3) Have relators an adequate remedy by appeal?

"The first and second questions are answered in the affirmative and the third question in the negative * * *. (p. 696)

"* * *.

"* * *. If an appeal is not available, the decree of public use and necessity is a final judgment reviewable by writ of certiorari as a matter of right in aid of the appellate jurisdiction of this court. The statute (Rem. Rev. Stat., sec. 1002 (P. P. C. Sec. 15-3)) reading as follows, grants this right:

" 'A writ of review shall be granted by any court, except a police or justice court, when an inferior tribunal, board or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, board or officer, or one acting illegally, or to correct any erroneous or void proceeding, or a proceeding not according to the course of the common law, and there is no appeal, nor in the judgment of the court, any plain, speedy and adequate remedy at law.'

"It is clear from a reading of the foregoing statute that, where there is no right of appeal by which review may be had of alleged errors in a decree of public use and necessity, such decree is a final judgment which may be reviewed only by writ of certiorari, which, of course, issues as a matter of right. * * *." (pp. 696, 697)

"* * *.

"The exercise of the power of eminent domain is a special proceeding ordinarily involving the entry of three separate and distinct judgments. Chicago, M. & P. S. R. Co. *v.* Slosser, 82 Wash. 467, 144 Pac. 706, and State ex rel. Grays Harbor Logging Co. *v.* Superior Court, 100 Wash., 485, 171 Pac. 238." (P. 701)

"* * *.

"* * * If it be conceded, *arguendo*, that such right of appeal is granted, it does not follow, in view of the established law of this state that there are three

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> separate judgments in a condemnation proceeding, that the appeal is from the second instead of from the first or third of such judgments; that is, from the judgment on the award rather than from the decree of public use and necessity or the decree of appropriation. We agree with counsel for relators that the statute does not require or admit of such construction, and reason and practice do not recommend it." (p. 705)

Since the decisions of the three United States Supreme court cases last cited, holding a decree of public use and necessity in an eminent domain proceeding in the State of Washington is not a final judgment within Section 237 of the Judicial Code, the Supreme Court of the United States held that the characterization of a judgment as a final judgment by the State Court of last resort should be regarded by the Supreme Court of the United States in determining whether such a judgment was final.

In the case of *Thomas J. Brady* v. *Terminal Railroad Association of St. Louis*, 302 U. S. 678, 82 L. Ed. 523, 58 Sup. Ct. Rep. 134, the Court held:

> "It appearing that the judgment of the Supreme Court of Missouri is a final judgment under the decisions of that court cited by petitioner in his petition for rehearing, the petition is granted, the order denying a writ of certiorari is vacated, and the writ of certiorari is granted." (82 L. Ed. 523)

In *State of Washington ex rel Grays Harbor Logging Co.* v. *Superior Court of Washington for Chehalis County*, 61 L. Ed. 702, the Supreme Court of the United States said:

> When the litigation in the state courts is brought to a conclusion, the case may be brought here upon the Federal questions already raised as well as any that may be raised hereafter; for although the state courts, in the proceedings still to be taken, presumably will feel themselves bound by the decision heretofore made by

the supreme court (82 Wash. 503), as laying down the law of the case, this court will not be thus bound (United States v. Denver & R. G. R. Co., 191 U. S. 84, 93, 48 L. Ed. 106, 109, 24 Sup. Ct. Rep. 33; Messenger v. Anderson, 225 U. S. 436, 444, 56 L. Ed. 1152, 1156, 32 Sup. Ct. Rep. 739; Coe v. Armour Fertilizer Works, 237 U. S. 413, 418, 59 L. Ed. 1027, 1029, 35 Sup. Ct. Rep. 625)" (at p. 706).

Such a holding in the case at bar would have the effect of making it practically impossible for a public utility district to get the money with which to acquire a decree of appropriation. Certainly appellants should not be denied the right to a review of the holdings of the Supreme Court of the State of Washington on the question as to whether or not the Washington statutes involved in the condemnation were repugnant to the Federal Statutes, especially in a case like that at bar where the judges of the Supreme Court of Washington differed as to whether or not the State statutes were repugnant to Federal statutes, and the condemnation should for that reason fail. However, a holding that under the laws of the United States the judgment here sought to be appealed from was not a final judgment of which the United States Supreme Court had jurisdiction would make it practically impossible for any public utility district to borrow the money to finance a substantial award to acquire the property. Lenders would not be willing to finance a bond issue to be used for paying an award for property to be condemned when the question whether the plan or system of operation was repugnant to the United States Laws could only be determined in the Supreme Court of the United States after the property had been paid for and put in operation. This is especially true where, as in the case at bar, a dissenting minority of the Supreme Court of the State of Washington held that the Federal

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questions involved required a denial of the Decree of Public Use and Necessity.

IV. State of Proceedings and Manner in Which Federal Question Was Raised

The Federal question was raised at the outset and urged throughout all proceedings in the Superior Court of the State of Washington for Chelan County. One of the statutory grounds of the respondents' demurrers was:

> "6. That the petition in eminent domain does not state facts sufficient to constitute a cause of action."

Said demurrers to the petition in eminent domain were overruled.

The Supreme Court of the State of Washington has held in a large number of cases that the statutes with reference to eminent domain cases do not contemplate any answer upon the part of the condemnee. The person whose property is sought to be taken may, without any pleading, make any defense to such actions he sees fit.

McPherson Bros. v. *Superior Court for Chelan County,* 108 Wash. 58, 182 Pac. 962;

Seattle & M. R. Co. v. *Murphine,* 4 Wash. 448, 30 Pac. 720;

State ex rel. Ami Co. v. *Superior Court,* 42 Wash. 675, 85 Pac. 669;

In the Matter of Pike Street, 42 Wash. 551, 85 Pac. 45;

Manhattan Bldg. Co. v. *Seattle,* 52 Wash. 226, 100 Pac. 330;

Tacoma v. *Wetherby,* 57 Wash. 295, 106 Pac. 903;

Tacoma Eastern R. Co. v. *Smithgall,* 58 Wash. 445, 108 Pac. 1091.

After the Superior Court had overruled the demurrers of the original respondents in the eminent domain proceed-

ing, the Town of Chelan and Chelan Joint School District No. 129 each filed an intervener's complaint which raised the Federal questions here involved, which complaints were both succeeded by intervener's amended complaints, which amended complaints likewise raised the Federal questions and were on file and before the Superior Court at the time of the hearing upon the application for decree of public use and necessity.

In the Superior Court's memorandum decision on motion to make more definite and certain, and on demurrer, the trial Court ruled directly on the Federal questions involved, as appears more fully from a copy of that opinion which is appended to this Statement, and marked "Appendix B". That opinion, designated, "Memorandum Decision on Motion to Make More Definite and Certain, and on Demurrer", shows that the Superior Court, in ruling on the demurrer, held that the State statutes in question as construed and applied were not repugnant to the Federal statutes above referred to.

At the hearing upon the application for the decree of public use and necessity, appellants again raised the Federal question by counsel for respondents in said eminent domain proceeding, by the use of the following language:

> "In the third place, Respondents are going to object to the entry of an Order of Public Use and Necessity at this time on the ground and for the reason that the plan of operation set forth in the Resolution, which is made part of the Petition in Eminent Domain, shows clearly that if the property be condemned that it will be operated, if at all, in violation of the Federal laws prohibiting the maintenance of rates or any agreement to maintain rates by the Federal licensee, and in defiance of that part of the law which gives to the Federal Power Commission the right to fix rates in the event that a State Supervising Authority does not fix

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the rates at which power shall be sold by the licensee of the Federal project."

(Bill of Exceptions, certified by the Superior Court, p. 254.)

The opinion of the Superior Court of the State of Washington for the County of Chelan appended to this Statement, marked "Appendix C", affirmatively shows that the Federal questions were presented to, considered, and decided by it adversely to appellants.

> "I am not unmindful of the urgent and persuasive argument made by counsel regarding the other Federal questions as to the right—particularly as to the right—of the Public Utility District to proceed in this case under the franchise or license, and without any consent or permission from the Federal License Commission, but the questions in that were, I think, determined by the Court in the ruling on the demurrer."
>
> (Page 264, Bill of Exceptions certified by Superior Court.)

Rule 16 of the Supreme Court of the State of Washington requires a statement of questions involved. Subparagraph 4 of said Rule 16 provides:

> "The statement of the questions involved must set forth each question separately in the briefest and most general terms, without names, dates, amounts or particulars of any kind. * * *."

The first three questions set forth in the Statement of Questions Involved in plaintiffs' brief in the Supreme Court of the State of Washington from which an appeal has been allowed, were as follows:

> "1. Do the limitations in a Federal Power Commission license which is acquired from the original licensee by condemnation remain binding on the condemnor?

"2. Can a PUD condemn a federally licensed hydro electric plant when the system or plan upon which the condemnation is based provides for revenue bonds containing covenants repugnant to Federal law?

"3. Are the Washington Statutes re eminent domain proceedings by PUD's invalid when construed to authorize condemnation by such districts of federally licensed power projects pursuant to a system or plan containing provisions repugnant to Federal law?"

(P. 2, Brief of Plaintiffs in the Supreme Court of the State of Washington.)

Appellants maintained in the Superior Court and also in the Supreme Court of Washington, that the State statutes involved, if construed and applied as they were by the Superior Court and the Supreme Court of the State of Washington, would be repugnant to two Federal Statutes, which are:

Vol. 49, United States Statutes at Large, Sec. 206, p. 842, 844; U. S. C. A. Title 16, Sec. 803 (h);

Vol. 41, United States Statutes at Large, Sec. 19, p. 1073; U. S. C. A. Title 16, Sec. 812.

The opinion of the Supreme Court of the State of Washington appended to this Statement affirmatively shows that the Federal questions were presented to, considered and decided by it. That Supreme Court held the state statutes as construed and applied were not repugnant to the United States statutes.

"* * *

"The first three contentions may be considered together. The substance of the company's argument on those points is that the District, as transferee, takes the Federal Power Commission license subject to all the provisions and limitations contained therein; that one of those provisions vests authority in the Federal Power Commission to regulate the services rendered

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and the rates charged by the licensee; that the district's proposed bond issue contains covenants guaranteeing bondholders that the district will maintain rates sufficient to pay the interest and retire bonds as due; that such a covenant denies the right of the Federal Power Commission to regulate rates and is contrary to the Federal Power Act in that it is an agreement to fix or maintain rates."

The dissenting opinion of two judges of the Supreme Court of the State of Washington appears in connection with the opinion of the Supreme Court of Washington which is appended to this Statement. It likewise affirmatively shows that the Federal questions were presented to, considered and decided by the Court:

> "I disagree with the majority in its conclusions upon the first three contentions made by the plaintiff Company, considered collectively by the Court. Upon the issues presented by those contentions I think the order entered by the trial court should be reversed."

In view of the opinion of the Supreme Court of the State of Washington in the recent case of *State ex rel Northwestern Electric Co., et al.* vs. *Superior Court,* 27 Wash. (2d) 694, and in view of the order of the Supreme Court of the United States in the case of *Thomas J. Brady* vs. *Terminal Railroad Association of St. Louis,* 302 U. S. 678, 82 L. Ed. 523, 58 Sup. Ct. Rep. 134, appellants respectfully request the court, in the event that it should hesitate to note probable jurisdiction, that it enter an order passing upon the question of jurisdiction and determining whether the judgment appealed from is a final judgment until a hearing upon the merits.

V. The Federal Questions Involved Are Substantial

The ultimate Federal question presented to the Supreme Court of the State of Washington was:

If it clearly appeared from the petition in eminent domain, and the resolution of the Public Utility District authorizing the eminent domain proceedings attached to said petition as required by law, and from the undisputed evidence that the use of the property sought to be condemned was to be pursuant to a plan or system of operation in violation of Federal statutes:

Vol. 49, United States Statutes at Large,
Sec. 206, p. 842, 844; U. S. C. A. Title 16,
Sec. 803 (h);
Vol. 41, United States Statutes at Large,
Sec. 19, p. 1073; U. S. C. A. Title 16, Sec. 812;

was the petitioner Public Utility District entitled to a decree adjudicating the public use and necessity for the taking? The effect of granting such a decree by the Superior Court was to permit that court to proceed to a hearing for the determination of the amount of the award which would constitute just compensation for the property sought to be taken.

If the property sought to be taken was to be under a plan or system of operation in a manner contrary to the laws of the United States, appellants contend that the eminent domain proceedings must fail. Under the laws of the State of Washington the property could only be taken by eminent domain proceedings if it be taken for a public use. Since Article VI of the United States Constitution makes United States Laws made in pursuance of the Constitution the supreme law of the land, property could not be taken to be used under a plan or system of operation contrary to United States laws.

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The Supreme Court of the State of Washington construed and applied the Washington statutes hereinbefore specified as not being repugnant to the two United States Statutes above referred to.

It must be borne in mind at all times that appellants never contended that the public Utility District does not have the right to condemn a federally licensed project for the development of electricity, but they do contend and have at all times contended that the Public Utility District is without the right to condemn the federally licensed project here involved under the particular plan or system or operation set forth in the resolution authorizing the condemnation, because the plan or system of operation was to be in violation of the Federal Laws and the property could not, if the Federal Laws were observed, be put to any use whatsoever. To permit the condemnation for the purpose of operation pursuant to the plan or system in the resolution which was consistent with and authorized by the statutes of the State of Washington, was to necessarily hold that the statutes of the State of Washington authorizing such condemnation and system of operation were not repugnant to the Federal statutes.

In sustaining the validity of the Washington statutes here involved, both the Superior Court of the State of Washington and the Supreme Court of the State of Washington had before them Resolution No. 51 of Public Utility District No. 1 of Chelan County.

Said resolution contained, among other matters and things, the following:

> "E. In order to carry out the plan or system herein specified and adopted, the District shall issue and sell its revenue bonds in an amount not exceeding $10,000,000. Said bonds shall bear such date as shall hereafter be fixed by resolution, shall be of the denomination of $1,0000 each, shall be numbered from one

up, consecutively, and shall mature commencing with the second and ending with the thirtieth year after the date of issue thereof, in such amounts, as near as practicable, as shall, together with the interest on all outstanding bonds, be met by equal annual installments for the payment of the principal and interest on said bonds."

(Page 5 of Resolution No. 51, Marked "Appendix D" appended to this Statement.)

"• • •

"F. There shall be and there is hereby created and established, a special fund to be known as the 'Serial Electric Revenue Bond Fund, 1945.' The district does obligate and bind itself irrevocably to pay into such fund out of the gross revenues of the public utility herein established and the works, plants and facilities herein provided for, including all additions and betterments to and extensions of the foregoing now or hereafter purchased, condemned, constructed or otherwise acquired, such amount as may be necessary to pay the principal of and interest on said bonds as the same respectively mature. Such payments shall be made into such fund on the tenth day of each month after the issuance of any bonds hereunder in amounts at least equal to the sum of:"

(Page 6 of Resolution No. 51 appended to this Statement.)

"• • •

"There is hereby created and established in said 'Serial Electric Revenue Bond Fund, 1945', a Reserve Account. The district does hereby obligate and bind itself irrevocably to pay annually into such Account in the manner provided in paragraph 3 of this Section, not later than the principal payment date of each year, an amount equal to ten per cent (10%) of the total principal and interest requirements of the next ensuing year. Whenever the moneys in said

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Account aggregate an amount equal to the total principal and interest requirements for the next ensuing year, payments thereafter paid into said Account may be used by the District for the purpose of purchasing or redeeming said bonds, or for the purpose of making additions and betterments to and extensions of the electric utility system herein established, including the works, plants and facilities herein provided for, or for any other lawful purpose."

(Pages 6 and 7 of Resolution No. 51 appended to this Statement.)

"* * *.

"The District further binds itself to establish and maintain rates or charges for the electricity generated, transmitted and distributed by means of the public utility system herein established including all works, plants and facilities to be acquired or constructed as provided herein, and all additions and betterments to and extensions thereof which hereafter may be purchased, condemned or constructed, as will provide sufficient revenues to permit the payment of said sums into such special fund which the District has pledged to set aside for the payment of principal and interest and for the Reserve Account as herein provided, to be applied to the payment of the principal and interest of the bonds herein authorized until such bonds and interest shall have been paid in full, and in addition thereto, all costs of operation and maintenance."

(Resolution No. 51, last page preceding Certificate.)

"* * *."

Said resolution also shows that among the properties sought to be condemned is:

"The electric generating plant of the Washington Water Power Company located in Chelan County and listed below, including the powerhouse, dam, reser-

voir, flumes, raceways, diversion works, head works, waterways, buildings and other works and structures forming a part of or appertaining to said generating plant and station, used or enjoyed or capable of being used or enjoyed in conjunction therewith and all lands of the Company on which same are situated, and all the Company's lands, easements and flowage rights permitting the storage of water for reservoir purposes and the flooding of lands lying along or adjacent to the Chelan River, and Chelan Lake, and the tributaries thereof in the State of Washington, and all other of the Company's real estate and interests therein, rights in respect of or relating to water, machinery, equipment, appurtenances, supplies, franchises, licenses, permits and other rights and other property forming a part of or appertaining to said generating plant and station, used or enjoyed or capable of being used or enjoyed in conjunction therewith.

"THE CHELAN HYDRO-ELECTRIC GENERATING PLANT, situated on the Chelan River, in Chelan County and that certain license issued by the Federal Power Commission, Project No. 637, Washington, May 8, 1926, expiring May 8, 1976. The total name plate rating of the installed generators is 48,000 kilowatts."

(Page 2 of Resolution No. 51.)

That the above described generating property is under license from the Federal Power Commission is shown by Exhibit 5 made part of the Bill of Exceptions by the order certifying the same on the 2nd day of March, 1949, by Honorable Fred Kemp, Judge of the Superior Court of the State of Washington.

That the Federal questions involved in this appeal are substantial appears from Pages 2, 3, 4, 5, 6, 7, 8, 9 and 10 of the opinion of the Supreme Court of the State of Washington, a copy of which is marked "Appendix A" and hereto appended, and from the dissent of the dissenting

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judges which is set forth upon and as part of the said Appendix A.

VI. It is therefore respectfully submitted that this Court has jurisdiction of this appeal under Title 23, United States Code, Section 1257, Paragraph 2.

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APPENDIX "A"

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 30837 En Banc

THE STATE OF WASHINGTON ex Rel., THE WASHINGTON WATER POWER COMPANY, a Corporation, CITY BANK FARMERS TRUST COMPANY, a Corporation, and RALPH E. MORTON, and CHELAN JOINT SCHOOL DISTRICT No. 129, a Municipal Corporation, and TOWN OF CHELAN, a Municipal Corporation, *Plaintiff*,

v.

THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR CHELAN COUNTY, HONORABLE FRED KEMP, JUDGE, *Defendant*

Filed July 21, 1949.

This proceeding is by way of a writ of certiorari to review the action of the superior court of Chelan County in an eminent domain proceeding.

Action was commenced by Public Utility District No. 1 of Chelan county (hereinafter called the district) by which it sought to acquire by condemnation practically all of the property of the Washington Water Power Company (hereinafter called the company), in Chelan county and some of its property in Douglas county. Chelan Joint School District No. 129, and the Town of Chelan, both municipal corporations, were permitted to intervene in the action.

Demurrers were interposed by the company and the interveners. Application for an order for public use and necessity was brought on for hearing, after which the court overruled the demurrers and entered the order which is the subject of this review.

The property sought to be condemned consists of the transmission lines of the company in Chelan county and some in Douglas county, and the electric generating plant described as the Chelan Hydro-Electric Generating Plant, situated on the Chelan river, in Chelan county, and that

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certain license issued by the Federal Power Commission, Project No. 637, Washington, May 8, 1926, expiring May 8, 1976.

We shall have occasion throughout this opinion to refer to sections of the Federal Power Act. The entire Act is contained in 16 U. S. C. (1946 ed.) Section 791 through Section 825, and in 16 U. S. C. A., Section 791 through Section 825. In the interests of brevity, we shall cite the Act only by section numbers.

The company relies upon the following points before this court.

"(1) The limitations originally inherent in a license to develop, generate, transmit and distribute hydroelectric power issued by the Federal Power Commission remain restrictions upon a municipality to which the license is transferred by judicial sale.

"(2) Under the statutes of the State of Washington a public utility district does not have the right to condemn a utility property when the system or plan proposed and set forth in the Resolution pursuant to which the right of eminent domain is exercised and instituted, provides that the property shall be paid for by revenue bonds containing covenants repugnant to the United States laws.

"(3) If the Washington statutes re eminent domain proceedings by public utility districts are construed to authorize condemnation by public utility districts of power projects operated under a license from the Federal Power Commission and payment therefor with proceeds of revenue bonds containing (a) a covenant to maintain rates, and (b) a covenant which is contrary to the provisions of the Federal Power Act for regulation and control of rates by the Federal Power Commission in the absence of regulation of the rates charged by such licensee, they are invalid because they are repugnant to the laws of the United States.

"(4) A public utility district cannot acquire property by condemnation when such property is situated in a county other than that in which is situated the superior court of the county wherein the petition in eminent domain is filed.

"(5) The United States of America is a necessary party to an eminent domain proceeding when a hydroelectric generating property is situated in part on property owned by the United States of America and is owned and operated by a public service corporation under the terms of a license issued by the Federal Power Commission pursuant to the provisions of the Federal Power Act.

"(6) Public interest is a necessary concomitant of public use and when a critical power shortage such as now exists in the State of Washington, and such as existed at the time of the hearing on the application for a Decree of Public Use and Necessity, requires the curtailment of the use of electric power and energy, the greater public use requires that all generating facilities be operated so as to produce the maximum amounts of electric power and energy. That being so, a decree of Public Use and Necessity should be denied a public utility district petitioner in an eminent domain proceeding where the evidence indicates that if the public utility district operates the hydroelectric property sought to be condemned, in such manner as to first make adequate provision for the needs of the district as required by law, the people of the State of Washington will suffer the loss of a very large number of kilowatt hours of electric energy, and said facilities will not and cannot be operated for the greatest public use of the inhabitants of Washington.

"(7) The fact that two municipalities (one of them wholly within, and the other partially within, the geographical limits of a public utility district) will each suffer a large loss of income from taxes and have their respective capacities for incurring bonded indebtedness drastically reduced to a point where their capacities for performing essential services to their respective inhabitants are materially reduced, by the removal of electrical properties from the tax rolls in the event of the acquisition of such properties by the public utility district, coupled with the fact that the people of the State of Washington will lose a large amount of electrical energy by reason of the operation of such hydroelectric properties in conformity with law by the public utility district, is a matter of such public interest as to affect the

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question of whether a decree of public use and necessity should be entered, and would make material, relevant, and competent all of the offers of proof by the Town of Chelan, a Municipal Corporation, and by Chelan Joint School District No. 129, a Municipal Corporation.

"(8) The petitioner is not entitled to a Decree of Public Use and Necessity entitling it to acquire by condemnation the generating capacities of respondent, The Washington Water Power Company, a corporation, because petitioner has contracts for an adequate supply of power."

The first three contentions may be considered together. The substance of the company's argument on those points is that the District, as transferee, takes the Federal Power Commission license subject to all the provisions and limitations contained therein; that one of those provisions vests authority in the Federal Power Commission to regulate the services rendered and the rates charged by the licensee; that the district's proposed bond issue contains covenants guaranteeing bondholders that the district will maintain rates sufficient to pay the interest and retire bonds as due; that such a covenant denies the right of the Federal Power Commission to regulate rates and is contrary to the Federal Power Act in that it is an agreement to fix or maintain rates.

The license to construct and maintain the Chelan dam was originally issued by the Federal Power Commission to the Chelan Electric Company, which, with the consent of the Commission, assigned its rights to The Washington Water Power Company. Article 28 of that license, the provision in question here, provides in part:

"Article 28. The Licensee shall abide by such reasonable regulation of the services to be rendered to customers or consumers of power, and of rates and charges of payment therefor, as may from time to time be prescribed by any duly constituted agency of the State in which the service is rendered or the rate charged; and in case of the development, transmission, distribution, sale or use of power in public service by the Licensee or by its customers engaged in public service within a State which has not authorized and empowered a commission or other agency or agencies

within said State to regulate and control the services to be rendered by the Licensee or by its customers engaged in public service, or the rates and charges of payment therefor, or the amount or character of securities to be issued by any of said parties, it is agreed as a condition of this license that jurisdiction is hereby conferred upon the Commission, upon complaint of any person aggrieved or upon its own initiative, to exercise such regulation and control until such time as the State shall have provided a commission or other authority for such regulation and control. . . . *Provided*, That the jurisdiction of the Commission shall cease and determine as to each specific matter of regulation and control prescribed in this Article as soon as the State shall have provided a commission or other authority for the regulation and control of that specific matter."

The inclusion of this Article stems from Section 812 of the Federal Power Act which provides:

"As a condition of the license, every licensee under this chapter which is a *public-service corporation*, or a person, association, or corporation owning or operating any project and developing, transmitting, or distributing power for sale or use in public service, shall abide by such reasonable regulation of the services to be rendered to customers or consumers of power, and of rates and charges of payment therefor, as may from time to time be prescribed by any duly constituted agency of the State in which the service is rendered or the rate charged. That in case of the development, transmission, or distribution, or use in public service of power by any licensee under this chapter or by its customer engaged in public service within a State which has not authorized and empowered a commission or other agency or agencies within said State to regulate and control the services to be rendered by such licensee or by its customer engaged in public service, or the rates and charges of payment therefor, or the amount or character of securities to be issued by any of said parties, it is agreed as a condition of such license that jurisdiction is hereby conferred upon the commission, upon complaint of any person aggrieved or upon its own initiative, to exercise such regula-

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tion and control until such time as the State shall have provided a commission or other authority for such regulation and control: *Provided*, That the jurisdiction of the commission shall cease and determine as to each specific matter of regulation and control prescribed in this section as soon as the State shall have provided a commission or other authority for the regulation and control of that specific matter." (Italics ours.)

By Resolution No. 51, the district sought to acquire the properties in question. The resolution set up a plan for the acquisition at an estimated cost of $10,000,000.00, to be financed by the sale of revenue bonds and created a special fund to be known as the "Serial Electric Revenue Bond Fund." The district obligated and bound itself irrevocably to pay into that fund out of the gross revenues such amount as may be necessary to pay the principal on the bonds as they mature. It also bound itself to establish and maintain rates sufficient to provide revenues to permit the payment of funds into the special fund for the payment of bonds, interest, and all costs of operation.

It is the contention of the company that the district is not a regulatory agency of the state, and therefore, the plan to issue revenue bonds, containing an agreement to maintain or increase rates as an integral part of the plan of operation, is contrary to Article 28 of the license and Section 812 of the Act, in that it is an interference with the reserved right of the Federal Power Commission to regulate rates and charges of a licensee.

On the other hand, the district contends that it is a duly constituted agency of the state, clothed with delegated authority from that sovereignty to regulate and control rates and services, and therefore free from Federal regulation under the provisos to Article 28 of the license and Section 812 of the Act. This theory is based upon Rem. Supp. 1945, Section 11610 (d) which authorizes public utility districts to sell electric current "for all uses, with full and exclusive authority to sell and regulate and control the use, distribution, rates, service, charges, and price thereof free from the jurisdiction and control of the Director of Public Works and the Division of Public Utilities."

Our first problem, therefore, is to determine whether the state *delegated* power to the public utility districts to regulate rates within their borders, so as to constitute them agencies of the state, or whether it *abrogated* such power to them. From an examination of Rem. Supp. 1945, Section 11610 (d), it is obvious that the state did not delegate power to the public utility districts to act for it in the regulation of rates. The legislature created these municipal corporations and simply said that, as to such districts, there will be no such regulation whatsoever. Hence, the districts, at least in those matters set forth in the above statute, are neither agencies of the state nor answerable to the state; they are "full and exclusive" authorities within themselves.

Does this absence of state regulation open the door to Federal intervention, as the company contends? Turning again to the Federal Power Act, we note under Sec. 812 that only the following are subject to regulation by the Federal Power Commission:

". . . every licensee under this chapter which is a public-service corporation, or a person, association, or corporation owning or operating any project . . . for sale or use in public service."

Section 796(3) of the Act defines "corporation" as follows:

"(3) 'corporation' means any corporation, joint-stock company, partnership, association, business trust, organized group of persons, whether incorporated or not, or a receiver or receivers, trustee or trustees of any of the foregoing. It *shall not include 'municipalities' as hereinafter defined:*" (Italics ours.)

Section 796 (7) defines "municipality" as follows:

"(7) 'municipality' means a city, county, irrigation district, drainage district, or other political subdivision or agency of a State competent under the laws thereof to carry on the business of developing, transmitting, utilizing, or distributing power;" (Italics ours.)

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Section 797 (e) authorizes the commission:

"To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, *or to any State or municipality* for the purpose of constructing, operating, and maintaining dams, . . ." (Italics ours.)

Section 807 expressly reserves:

". . . the right of the United States or any State or municipality to take over, maintain, and operate any project licensed under this chapter at any time by condemnation proceedings upon payment of just compensation . . ."

We are of the opinion that it was the purpose of Congress, under Sec. 812, to confer jurisdiction upon the commission to regulate rates of licensees which are public service *corporations* and that it was not the intention to confer jurisdiction to regulate rates of licensees which are municipalities. Throughout the Act is evidenced a determination to recognize the independence of the states from domination or encroachment by the Federal Government. In construing this intent of the Act the Supreme Court of the United States declared, in *First Iowa Hydro-Electric Co-op. v. Federal Power Commission,* 328 U. S. 152, 90 L. Ed. 1143, 66 S. Ct. 906:

". . . We find that when that Act is read in the light of its long and colorful legislative history, it discloses both a vigorous determination of Congress to make progress with the development of the long idle water power resources of the Nation and a determination to avoid unconstitutional invasion of the jurisdiction of the States. The solution reached is to apply the principle of the division of constitutional powers between the State and Federal Governments. This has resulted in a dual system involving the close integration of these powers rather than a dual system of futile duplication of two authorities over the same subject matter."

In the same opinion the court quoted the remarks of Representative William LaFollette of Washington in the House debates on the Power Act:

". . . 'We are earnestly trying not to infringe the rights of the States. If possible we want a bill that can not be defeated in the Supreme Court because of omissions, because of the lack of some provision that we should have put in the bill to safeguard the States.' 56 Cong. Rec. 9810.

"As indicated by Representative LaFollette, Congress was concerned with overcoming the danger of divided authority so as to bring about the needed development of water power and also with the recognition of the constitutional rights of the States so as to sustain the validity of the Act. The resulting integration of the respective jurisdictions of the State and Federal Governments is illustrated by the careful preservation of the separate interests of the States throughout the Act, without setting up a divided authority over any one subject."

See also *Connecticut Light & Power Co. v. Federal Power Commission*, 324 U. S. 515, 89 L. Ed. 1150, 65 S. Ct. 749; *Re Nebraska Power Company*, 62 P. U. R. (N. S.) 276.

We are not unmindful of Sect. 801 of the Act which provides:

". . . any successor or assign of the rights of such licensee, whether by voluntary transfer, judicial sale, foreclosure sale, or otherwise, shall be subject to all the conditions of the license under which such rights are held by such licensee and also subject to all the provisions and conditions of this chapter to the same extent as though such successor or assign were the original licensee under this chapter: . . ."

We feel that the above section would bind the district as to provisions such as a limitation on the amount of water to be appropriated, etc., but that it would not give the commission the power to regulate rates of a municipality. It would bind the assignee only as to those provisions to which it could have been subjected had the assignee been the origi-

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nal licensee, and if such a licensee is a municipality, the commission has no authority to regulate its rates.

As grounds for its contention that the proposed bond-issue contract is "repugnant to the laws of the United States", the company relies upon Section 803 (h) which provides:

"(h) Combinations, agreements, arrangements, or understandings, express or implied, to limit the output of electrical energy, to restrain trade, or to fix, maintain, or increase prices for electrical energy or service are hereby prohibited."

That section was enacted for the sole purpose of prohibiting monopolistic combinations, agreements, etc. It is the "anti-trust" section. For example, an agreement by The Washington Water Power Company, the Puget Sound Power & Light Company, and the Chelan P. U. D. to limit the output of electrical energy, or to restrain trade, or to fix, maintain, or increase prices for electrical service to the detriment of consumers would be prohibited. But it was not the intention of the provision in question to prohibit an agreement between the district and its bondholders that the district would maintain rates to pay the principal and interest of the bonds. Furthermore as we have stated previously, by becoming the assignee, the district does not *ipso facto* become subject to jurisdiction by the commission. Admitting *arguendo*, that the commission could exercise jurisdiction to regulate rates, there is nothing in the record that "upon complaint of any person aggrieved or upon its own initiative," the commission will ever exercise such regulation, or that it would not take into consideration the cost of operation and also the cost of purchasing the facility.

Therefore, as to the first three contentions of the company, we find nothing in the proposed revenue bond plan of the district contrary to the limitations imposed by United States law upon a municipality which is the assignee of a license of the Federal Power Commission.

Passing to a consideration of point No. 4, the testimony shows that the area now served by the company in Douglas county, and covered by its distribution system, is confined

to the banks of the Columbia River for approximately ten miles. It is devoted to orchards and serves only ten users. We held in *Carstens v. Public Utility District No. 1 of Lincoln County*, 8 Wn. (2d) 136, 111 P. (2d) 583, that a public utility district could condemn a portion of a distribution line lying in a county outside the district when the effect of such taking is only incidental. We are satisfied from the record here that the taking of the distribution lines in Douglas county is merely incidental to the taking of the Chelan county property, and hence, permissible.

We find no merit in the fifth contention, that the United States is a necessary party to this proceeding. No property of the United States is sought to be taken. Furthermore, the company has no right to complain that others having some interest in the land are not made parties. *Delfield v. Tulsa*, 191 Okla. 541, 131 P. (2d) 754.

Nor is there any merit in the company's sixth point, the contention that the critical power shortage in the Northwest would be intensified because the district would not be able to join the Pacific Northwest Power Pool. The testimony shows that the Pool was organized in 1941. Its purpose was to obtain the maximum power available during the war, and it was sponsored by the War Production Board and the Federal Power Commission. The members are: Idaho Power Company, Utah Power & Light Company, Montana Power Company, The Washington Water Power Company, Puget Sound Power & Light Company, City of Seattle, City of Tacoma, Bonneville Power Administration, Pacific Power & Light Company, and Portland General Electric Company.

Marshall L. Blair, superintendent of operations of The Washington Water Power Company, testified that the pool is primarily a coordination of operation, which includes such things as the stream flow, reservoir elevations, proper loading of plants at some given time to satisfy certain loads, transmission flows of power, coordination of breakdown, and coordination of maintenance. The power shortage has increased since the war, and will continue until at least 1953. Under this arrangement the Chelan plant has been shut down during the spring months to permit the

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storage of water, and the power has been obtained from other sources of the pool.

The company contends that the district cannot legally become a member of the pool and that to permit the district to take over the Chelan plant would result in a distinct loss of power to the people of the Northwest. It was admitted that there was no physical reason why the plant could not be operated by the district within the pool. It should be noticed that the cities of Seattle, and Tacoma are members of the pool. The question of the legality of a public utility district becoming a member of the power pool is not before us. If such a question should arise, legislation could, if thought advisable, be enacted to permit the districts to join the pool. Furthermore, the testimony shows that, at the time of the hearing, the district was in the process of entering into a twenty-year contract with the Bonneville Administration for the sale of power. By purchasing such power from Bonneville during any critical periods, the same result obtained by joining the pool would be accomplished. In addition, even though there would be a distinct loss of power to the people of the Northwest, the people of the state have decreed that they shall have the right to condemn and take over the facilities of the private power companies. It is not within the province of the courts to question the advisability, the cost, or the resultant loss of power due to such action.

As to the final contention of the company, the intervener school district offered to prove that the total values of property within the district are $6,435,118.00, and that the value of The Washington Water Power property therein is $3,243,608; that the total *ad valorem* property taxes of the district would be $83,656.53, and that the taxes to be paid by the company would be $42,166.90, which would result in a loss to the district in the amount of $42,166.90; that the loss could be compensated for only by special levies, which are difficult, if not impossible, to obtain because of the statutory requirement that 40% of the voters in the last gubernatorial election must vote in such special election; that the district now has outstanding bonds in the amount of $235,000.00; and that there was a 32 mill levy made in 1947 and paid in 1948.

Intervener Town of Chelan offered to prove that the total assessed valuation of the town is $2,099,223.00; that the value of The Washington Water Power property within the town is $898,456.00; that the total *ad valorem* taxes of the town would be $31,568.71 and that the taxes to be paid by the company would be $13,512.69, with the resultant loss to the town in that amount.

These offers of proof were refused by the trial court on the ground that the matter of the loss of revenue to a municipality is not a legal ground for refusing the public utility district the right of eminent domain. It is unfortunate that these municipalities might lose much needed revenue because of the condemnation of this property by the district, but that is a matter for the concern of the legislative branch of the government, rather than of the judicial branch. Municipalities, as such, have no inherent right of taxation. They derive their right to raise revenue from the state, and what the state has given, the state can take away.

In *Gasaway v. City of Seattle*, 52 Wash. 444, 100 Pac. 991, it was held that, when a city of the first class acquired real estate by exercise of its power of eminent domain, the county could not thereafter enforce a prior tax thereon even though the county had not been made a party to the eminent domain proceedings. In significant language, this court said:

". . . All taxes are levied under the express or implied power of state. The state can fix the subject of taxation and exempt property. It can limit or extend the time of payment. The authority so delegated, when exercised, is none the less the execution of the state's power. If it can do all these things, it can take away not only the power to tax but the subjects of taxation as well. No person or municipality can acquire, as against the state, a vested right to taxes, or the right to insist upon the collection of taxes when levied."

But though the state has taken away a primary source of revenue of these taxing districts, it has created a new source which, to a large extent, will compensate for such

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loss. Realizing the consequent loss of revenue to various taxing districts by the withdrawal from their tax rolls of property condemned by a public utility district, the legislature has enacted so-called "in lieu" taxes; we refer to Rem. Supp. 1941, Sect. 11616-2, which was amended by the Laws of 1947, chapter 259, Sect. 2, p. 1079, and by the Laws of 1949, chapter 227, Sec. 2, p. 799. This measure levies a tax, similar to the "occupation tax" that most businesses pay, on the gross revenues of all public utility districts and apportions the receipts among the taxing districts within their boundaries on the basis of former levies upon the fair value of property withdrawn from their tax rolls. Thus, it is problematical whether or not the interveners here would sustain any actual loss of revenue.

The judgment of the trial court is correct, and its order of public use and necessity is affirmed.

SCHWELLENBACH, *J.*

We concur:

JEFFERS, C. J.
BEALS, J.
ROBINSON, J.
MALLERY, J.
HILL, J.
GRADY, J.

STEINERT, J., dissenting:

I disagree with the majority in its conclusions upon the first three contentions made by the plaintiff company, considered collectively by the court. Upon the issues presented by those contentions, I think the order entered by the trial court should be reversed.

STEINERT, *J.*

I concur.
SIMPSON, J.

APPENDIX "B"

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR CHELAN COUNTY

No. 15728

PUBLIC UTILITY DISTRICT NO. 1 OF CHELAN COUNTY, a municipal corporation, Petitioner,

vs.

THE WASHINGTON WATER POWER COMPANY, a corporation, City Bank Farmers Trust Company, a corporation, and Ralph E. Morton, Respondents

Memorandum Decision on Motion to Make More Definite and Certain, and on Demurrer

The Defendant, the Washington Water Power Company, a separately filed its Motion to require the Petitioner to make paragraphs VI. and VII. of the Petition in Eminent Domain more definite and certain, by setting forth therein, verbatim, a copy of that certain license issued by the Federal Power Commission, Project #637, May 8, 1926, expiring May 8, 1976, referred to in Exhibit A of the Petition which by reference was made a part of said paragraphs.

This License, along with the other items of property sought to be condemned by Petitioner, is described on page 6 of Exhibit C, (Resolution #53), attached to the Complaint and made a part of it,—described in substantially the language used in the Motion. This License was issued originally to the Chelan Electric Company, and is now concededly and incident to, and a part of, the property of The Washington Water Power Company, and that such License is presently in the possession of Respondent, The Washington Water Power Company.

I am of the opinion that a party is not required, either by such motion or by Bill of Particulars, to furnish or set forth in pleading a copy of an instrument already in possession of Respondent, or equally accessible to him. (Messick

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v. National Council Knights and Ladies of Security, 103 Wash. 143).

Accordingly, the Motion to Make More Definite and Certain will be overruled.

This ruling is proper, also, I believe, because when it once appears that a part of the property, or one of the items thereof, sought to be condemned by Petitioner, is a License from the Federal Power Commission, the Court is charged with knowledge of, and must take cognizance of, the Federal Power Act and all of the provisions and conditions imposed by such Act upon licensees. At any rate, the Court was furnished with a copy of the License in question and had the same before it in the argument upon the demurrer which followed the argument on the motion to make more definite and certain. Consideration was given to the terms and conditions of the License, as fully as if it had been set forth by way of an exhibit attached to the Petition.

As to Demurrer:

The Washington Water Power Company demurred to the Petition on all the statutory grounds, urging chiefly, if not entirely, that the Petition in eminent domain of Public Utility District No. 1 of Chelan County does not state facts sufficient to constitute a cause of action. Respondent, The Washington Water Power Company, hereinafter referred to simply as "Respondent", earnestly contends that:

> "the System Plan and Resolution of the District shows on its face that it is in fundamental conflict with the Federal Power Act and that if the properties were acquired in accordance with such System Plan and Resolution they could not be operated under the Federal Power Act. The basic trouble with the System Resolution is that it is designed to acquire these properties by the issuance of the rather recent method of revenue bonds. The Resolution contains a binding agreement with the purchasers of the bonds that rates will be fixed and maintained at a sufficiently high level to pay all ordinary operating expenses and at the same time a sufficient amount to pay off the bonds in a thirty-year

period. In other words, the rates to be charged the present customers of the Public Utility District are rates to pay the operating expenses and provide the purchase price of the properties. It is true that this purchase price is spread over a period of thirty years. This is a matter of degree and not one of principal. The purchase price could have been amortized over a period of five years or even one year, and the present users of power would be forced to pay the purchase price of the property for the benefit of future users of the power.

"This concept is fundamentally in variance with the principles of the Federal Power Act which provides that the rates for power shall only yield a fair return on the value of the property in addition to operating costs."

In support of its argument the Respondent points out that 16 U.S.C.A., Sec. 801, provides that any sale or transfer of a Federal Power License, whether by voluntary transfer or judicial sale, (as in condemnation), shall be subject to all the conditions of the license under which such rights are held by such licensee, and also subject to all the provisions and conditions of the Federal Power Act to the same extent as if the successor or assignee were the original licensee.

And, further, respondent quotes 16 U.S.C.A., Sec. 812, which is as follows:

"SUBMISSION TO REGULATION—EFFECT OF STATE CONTROL—RATES—SERVICE—SECURITIES.

"Sec. 19. (Act of 1920). That as a condition of the license, every licensee hereunder which is a public-service corporation, or a person, association, or corporation owning or operating any project and developing, transmitting, or distributing power for sale or use in public service, shall abide by such reasonable regulation of the services to be rendered to customers or consumers of power, and of rates and charges of payment therefor, as may from time to time be prescribed by any duly constituted agency of the State in which the service is rendered or the rate charged.

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"That in case of the development, transmission, or distribution, or use in public service of power by any licensee hereunder or by its customer engaged in public service within a State which has not authorized and empowered a commission or other agency or agencies within said State to regulate and control the services to be rendered by such licensee or by its customer engaged in public service, or the rates and charges of payment therefor, or the amount or character of securities to be issued by any of said parties, it is agreed as a condition of such license that jurisdiction is hereby conferred upon the commission, upon complaint of any person aggrieved or upon its own initiative, to exercise such regulation and control until such time as the State shall have provided a commission or other authority for such regulation and control: *Provided,* That the jurisdiction of the commission shall cease and determine as to each specific matter of regulation and control prescribed in this section as soon as the State shall have provided a commission or other authority for the regulation and control of that specific matter."

It is, of course, recognized that all the conditions of this License from the Federal Power Commission will be binding upon the transferee, whether the assignment of the License be by voluntary sale or by judicial sale such as condemnation. The System Plan and Resolution of the Petitioner frankly contemplates the charging of rates for electric energy, which will be sufficient not only to pay operation expenses but, also, pay the principal and interest on the bonds representing the purchase price of the property. But the Court cannot assume that reasonable rates, to be approved by the Federal Power Commission, will not be sufficient to pay off the cost of the property amortized over a thirty-year period, as well as pay the operating expense. That is not before the Court upon the demurrer to the Petition of the Public Utility District of Chelan County.

The Washington Water Power Company, itself, charges rates which presumably and undoubtedly not only pay all the operating expenses but also pay a return sufficient to

take care of dividends on stock and interest to mortgagee or bond holders. Whether the rates which the Public Utility District will be entitled to charge under the Federal Power Commission requiring that only a fair return can be exacted will exceed the rates charged by the present owner, The Washington Water Power Company, would be simply a matter of guess or speculation, which the Court upon demurrer is not required to make.

The Respondent insists that the Public Utility District is not subject to State regulation and, therefore, will be subject to regulation by the Federal Power Commission. I am of the opinion, however, that a public utility district is subject to State regulation, and that it is relieved from regulation as to rates and charges of payment for service by the provisions of Sec. 19 of the Act last above quoted. (Also 16 U.S.C.A., Sec. 812). That provision expressly provides that the Federal Power Commission shall exercise regulation and control as to rates "until such time as the State shall have provided the Commission *or outher authority* for such regulation and control." And, further, that section concludes as follows: "Provided that the jurisdiction of the Commission shall cease and determine as to each specific matter of regulation and control prescribed in this section as soon as the State shall have provided a Commission *or other authority* for the regulation and control of that specific matter".

The Public Utility Law of the State, Sec. 11610 (d), gives to the District: "full and exclusive authority to sell and regulate and control the usual distribution rates, service charges and price thereof, free from the jurisdiction and control of the Director of Public Works and Division of Public Utilities, in all things. . . ."

That was a provision contained in the original Act, and by the Laws of 1941, Chapt. 182, Sec. 7, Rem. Rev. Stats., Supp. 11611-7, it was enacted, "The Commission of each district . . . shall have the power and shall *be required to* establish, maintain and collect rates or charges for electric energy and water and other services . . ."

It certainly seems to me the State has the right to grant authority for the fixing of rates and charges for electric

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service to a special commission, a director of some department, or to a Public Utility District, or the commission thereof. Such a commission is the "other authority" mentioned in the Federal Power Act above quoted.

And I am of the opinion, therefore, that when a Public Utility District, duly formed, has acquired property from which it is furnishing electric energy and fixed rates and charges therefor, the jurisdiction of the Federal Power Commission ceases.

The Respondent earnestly contends that the Plan and System adopted by the District, namely, the issuance of Revenue Bonds whereby the District is obligated to fix and maintain rates at a level sufficient to pay not only the operating costs but also sufficient to pay the amortized purchase price debt and interest, is contrary to the Federal Power Act, and particularly because the plan plainly contemplates the making of a profit on the operation and not merely charging rates sufficient to pay expenses of operation and a reasonable return on the investment. And the Respondent in this connection relies on the case of Central Nebraska Public Power & Irrigation District of the Federal Power Commission. 161 Fed. 2d 782. This case is an appeal from a ruling and decision of the Federal Power Commission, reported in Vol. 64, Public Utilities Reports, N.S., pg. 263. The Central Nebraska Public Power District had applied for exemption from the payment of their annual charges due under the Federal Power Commission License, on the ground that the power was sold to the public without profit. The Federal Power Commission held that when Power Districts made charges and received moneys which were used to pay for the properties, such moneys constituted "profit". And it was held that the reports of the Nebraska Power Company showed an excess of earnings and return from their power sales, over and above the expense of operation, and a reasonable return, and that therefore, that Power District was not entitled to exemption from payment of the annual charges imposed by the Federal Power Commission. The decision of the Federal Power Commission was affirmed in the Federal Circuit Court of Appeals.

The decision on that point must stand as final, since the

United States Supreme Court has denied certiorari in the case.

The Petitioner District, on its part, has contended that under our State law the operation of a Public Utility District is on a non-profit basis. It may be quite true that the words, "without profit" mean one thing under the Federal Power Act and an entirely different thing under the State Public Utility Act. And I am of the opinion it is fairly to be found in the Act and in the many cases of our own Court, interpreting it that the statutory provision not only permitting but requiring the payment of bonds representing the purchase price to be made out of the rates fixed and collected by the district, and that such earnings and application thereof do not constitute profit, inhibited by law.

Be that as it may, we call attention to Carstens vs. P U D No. 1, 8 Wash. 2d 136, 131, where the phrase is used.

> ". . . due to the fact that a municipally owned enterprise of this nature may not be operated for profit and must establish its rates at the lowest possible point. Uhler vs. Olympia, 87 Wash. 1."

I do not see how the decisions in the Central Nebraska Public Power & Irrigation District case can affect the right of Petitioner to maintain its condemnation proceeding. The case goes no further than to hold in that particular instance, that the Nebraska District was subject to the payment of reasonable annual charges fixed by the Federal Power Commission. Whether there is any escape from that payment by the Petitioner when its district is formed, we do not know. But if it does have to pay annual charges because of the License, which it has obtained by eminent domain, requires such payment it will mean only the payment by the local district of that charge, along with other expense, burdens of conducting its operation.

The Respondent further urges that the Plan and System of the Petitioner, as shown by its Resolution, is in conflict with 16 U.S.C.A., Sec. 803 (h), which reads as follows:

> "All licenses issued under this part shall be under the following conditions:

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(h) That combinations, agreements, arrangements, or understandings, express or implied, to limit the output of electrical energy, to restrain trade, or to fix, maintain, or increase prices for electrical energy or service are hereby prohibited."

But as I have pointed out, the Federal Power Act expressly provides that the right of the Federal Power Commission to fix and control rates ceases when the State has placed the authority and responsibility therefor in the hands of some Commission or other authority. The fixing of rates, therefore, will be determined by the Commission of the Public Utility District itself, duly authorized so to do by the State statutory provision.

In this connection I call attention to the holding of our Supreme Court in the comparatively late case of State ex rel Northwestern Electric Co. vs. Superior Court, 128 Wash. Dec. 349-361, in which it was held as follows:

"We think it apparent that the district is not acquiring the franchise and properties of Northwestern for the purpose of:

"'Fixing the price or limiting the production or regulating the transportation of any product or commodity.'"

I shall not extend this memorandum much further. Nearly every objection that could be made to the acquiring of property by Public Utility District and its right to operate has been raised in one or more of the considerable number of cases involving Public Utility District formation, and its right of eminent domain, and to some extent the objections raised by Respondent or its demurrer have been covered, inferentially, at least.

The fact that in this case the objection is based upon the effort of Petitioner to condemn a license issued by the Federal Power Commission to Chelan Electric Company does not seem to me a question very much different from questions decided in the earlier cases. A license from the Federal Government is not altogether unlike a franchise held by a city or some other private corporation. Our statute expressly provides for the condemnation of franchises, along

with the rest of the property that may go to make up a power and light system.

It was held in State ex rel Washington Water Power Co. vs. Superior Court, 8 Wash. 2d 122, 131:

> "The right of the districts to secure the franchise of relators by eminent domain proceedings under ordinary circumstances, cannot well be questioned. The Act specifically gives the districts that right which conforms to the provisions of Article XII., Sec. 10 of our State Constitution . . . ."

We find in the books that "licenses are sometimes termed franchises, and franchises sometimes termed licenses." In fact, "franchise" is generally treated as of higher rank in the law than a license. "Franchise" has the right of a contract, while a license is rather in the nature of a personal privilege.

It may be that the Public Utility District, if it obtains the power plant of the Chelan River at the foot of Lake Chelan, and the License that the Company holds from the Federal Government, will be required to pay annual charges on the so-called profit: that is, on the amount of its rate earnings over and above the expense of operation, and what would be a reasonable return.

But if that be so, I cannot see that it is a valid objection to the District's right to condemn. That is a bridge that we do not have to cross at this time. It could be that the rates which the District will charge will not exceed the amount of rate charges made by the present owner, Washington Water Power Company, to cover its own operating expenses and the profit which it takes to pay in dividends and both interest and, possibly, reserve for retirement of bonded indebtedness. It would take evidence and proof to determine how such facts and figures compare. This, we are not expected to do on demurrer to the District's petition.

The demurrer of The Washington Water Power Company will be overruled.

City Bank Farmers Trust Company, a corporation, and Ralph E. Morton, two Respondents who have appeared in

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this action separately from Respondent, The Washington Water Power Company, made the same motion and demurred upon the same grounds as did the Washington Water Power Company. The ruling as to these two Respondents, appearing separately from The Washington Water Power Company, will be the same on both the motion and the demurrer as has been indicated.

Dated this 14th day of January, 1947.

(S.) Fred Kemp,
Judge.

Copies to

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H. E. T. Herman,
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Harvey F. Davis,
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In the Superior Court of the State of Washington in and for Chelan County

No. 15728

Public Utility District No. 1 of Chelan County, a Municipal Corporation, *Petitioner,*

vs.

The Washington Water Power Company, a Corporation, City Bank Farmers Trust Company, a Corporation, and Ralph E. Morton, *Respondents*

Order Overruling Motion and Demurrer

The motion of the defendants, the Washington Water Power Company, a corporation, City Bank Farmers Trust Company, a corporation and Ralph E. Morton, respondents, requiring the petitioner to make its petition in eminent domain in the above entitled action more definite and certain, and the demurrer of said respondents, The Washington

Water Power Company, a corporation, City Bank Farmers Trust Company, a corporation, and Ralph E. Morton, to petitioners petition in eminent domain in the above entitled action having come on regularly for hearing on the 8th day of September, 1947, and the petitioner being represented by its attorneys, Harvey F. Davis, Sam R. Sumner, Sr., and Sam R. Sumner, Jr., and the respondents being represented by Paine, Lowe and Coffin, and H. E. T. Herman and R. D. Kendall, their attorneys, and arguments of respective counsel for the parties having been heard, and the court having made and filed herein its memorandum decision and being fully advised in the premises, now, therefore,

It is hereby ordered, adjudged and decreed, that the motion and demurrer of respondents, The Washington Water Power Company, a corporation, City Bank Farmers Trust Company, a corporation, and Ralph E. Morton, be and the same are hereby overruled.

Done in open court this 6th day of February, 1948.

(S.) FRED KEMP,
Judge.

Presented by:

(S.) HARVEY F. DAVIS,
Attorney for Petitioner.

Approved as to Form:

PAINE, LOWE & COFFIN,
H. E. T. HERMAN, and
R. D. KENDALL,
Attorneys for Respondents.
By (S.) PAINE, LOWE & COFFIN.

APPENDIX "C"

OPINION OF TRIAL JUDGE UPON APPLICATION FOR DECREE OF PUBLIC USE AND NECESSITY

JUDGE KEMP: I am sure of that. It might even be difference of opinion as to what the law is, but he would have a right to cite it as he understood it to be.

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Well, Gentlemen, I am going to announce my decision on this difficult case at this time. I am mindful of the fact that it could well deserve study and a careful analysis of the evidence, and discussion of the authorities that have been submitted, but while this does not concern you particularly it is a fact that here in this county we have just a one-man judge, and it is quite a busy time. I have no opportunity, except with a great amount of night work, to give study to cases. I am not sure, I doubt if it would bring me to any different conclusion. It would only be having the satisfaction of rendering a decision that might be very much more helpful.

I think it must be recognized that in this case new questions have developed that have not been presented in the considerable number of Public Utility condemnation cases that have been before our Supreme Court, in quite a number of which the Washington Water Power has been a party. It has impressed me, right through the case, that it does work a hardship on the people of the Town of Chelan and the Chelan Joint School District, but I do not feel that that is a legal question. It may be a practical and somewhat a moral question as to the advisability of taking this property that pays such substantial taxes, taking it off the tax rolls. But that question is involved in all these Public Utility District cases. We must keep in mind that when P. U. D. was created in this county, as I assume was true in all other counties, one of the most debated and chief controversial questions was about the advisability of adopting the P. U. D., was the fact it would take from the tax rolls of the county these private public utilities, if I may use that phrase, and that is a question that is a political question, a question of policy. But the people of Chelan County have noted on that, it is recognized that there is a loss, at least an apparent loss, to all tax payers when taxes paid by the Puget Sound Power & Light and the Washington Water Power Company are removed, that the citizens of the county, the property owners, have to raise, by taxes, the money that these public utilities have been paying. And so, in a way, the effect of this was or could have been,—in fact, I think was anticipated in the Chelan schools all over Chelan County. In the face of

such a question the P. U. D. has been created with all the rights of condemnation, the right to acquire these facilities has been given. It is, you might say, regrettable, it may work a hardship in particular cases, but that does not go to the question of the validity of the law nor to the right to condemn. The right of Eminent Domain works a hardship in many cases. It can take a man's home. While it is obligated to compensate him in money damages, it can't compensate him in sentimental value for the loss of the home that he built, perhaps with his own hands, where his children have been born and raised. And we may say, to some extent, the right of Eminent Domain is ruthless but if, for the public good, and public benefit, it seems best so to do by the municipal authorities, City, County, Public Utility District, that right exists in theory, at least, and probably in the long run it must be deemed to be for the public benefit.

So I feel obliged to say that, as far as its effects upon the Chelan Joint School District and the Town of Chelan, that the objections made are not any defense to the action in law. There may be, too, as Mr. Davis has suggested, some help that will come from the Lieu Tax provisions that have been enacted and from school equalization provision, and it could well be, as I have perhaps,—even as a judge, taking notice of what is a matter of common knowledge, that even further relief is contemplated or, at least, hoped for by the Legislature.

It seemed to me, too, that one of the questions that, as counsel conceded, was serious or, at least, apparently knew was the question of whether this district was justified in condemning a plant which produced twice as much electrical energy as the users of Chelan County P. U. D. needed, for it does appear that the plant at Chelan generates twice the power and electrical energy that is needed to supply, presently, all the users of electricity in the county, both those now served by the Puget Sound system recently acquired by the District, and those under the Washington Water Power system.

As to that, there are two answers, one that is rather obvious: they have already the Puget Sound system, that is, the distribution system which serves, by and large, the

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majority of the users of electricity in the county. Possibly, roughly, it might be said 75%, although that may be off a little either way. Now they have no power plant. They do have power, at least they have a source of power, either under some sort of arrangement, temporary purchasing arrangement with Bonneville, but I think it is fairly a reasonable and by no means arbitrary or capricious exercise of power for this P. U. D. of Chelan County to acquire for its use its own generating plant. The only plant, anywhere near adequate plant, located in the county, therefore in the District, is this Washington Water Power Plant at the foot of Lake Chelan and on the Chelan River. The Puget Sound Rock Island Dam produces an amount of energy many, many times in excess of the needs of the District, more than ever could reasonably be anticipated would be needed by the Chelan County P. U. D. system, so its acquisition would seem wholly impracticable and it would be very doubtful if the Court would uphold an attempt to acquire the Rock Island plant by condemnation. Furthermore that is not in Chelan County,—only partially so,—with the major and, I believe, the greater tax-paying portion of it located in Douglas County. So that with the great dam or reservoir, consisting of Lake Chelan and the Lake Chelan watershed and the power plant in the Town of Chelan or on the Chelan River at Chelan Falls, all within the county, it would seem entirely logical and reasonable and not injudicious for the Commissioners of the District to plan to acquire its own generating plant, and the only serious objection, if it be serious, is the fact that it produces more electrical energy by 100%, approximately, than is needed. But it, apparently, isn't out of reason that in the period within the next few years, perhaps even ten or twenty years, the demands for power in this district will require all the power that is developed at the Washington Water Power plant at Chelan.

At any rate, it would be unreasonable to insist that the only plant they could acquire would be one that, you might say, would be cut and measured to the exact amount of energy that is exactly needed at the moment. And the case, one case, the Bremerton case, perhaps the Centralia

case cited by Mr. Davis, would seem to indicate that the Supreme Court has already held that the acquisition of a plant furnishing more power than is presently needed, if it is not excessive, is justified.

I do not believe that there is serious question as to the jurisdiction of the Court or as to the venue. As already pointed out, the cases in which Washington Water Power Company have been parties in Okanogan County and in Lincoln County involve the same question, although the question of law, perhaps, was not raised. The same question was also in the northwest case involving the Northwest Electric Company in Vancouver, when they acquired distribution lines extending beyond the City of Vancouver into Skamania and I believe one other county. There is no question in the Court's mind but what this Court has had jurisdiction to hear and determine this matter.

As to the Government being a necessary party, I am of the opinion that the Federal Government is not a necessary party. If they have not had their day in court they will not be hurt. I don't mean to pass the question off that superficially, but the argument has rested largely on the statutory provision that if condemnation is adjudged and compensation is arranged for and given, that the Court shall give the decree vesting fee title in the property in the condemnor. But it was never contemplated that the fee title to franchise or license would be vested—or, to the property over which franchise or license ran, would be vested any more than it was conceivably thought of in the Vancouver city case—city franchises of Vancouver was involved, or in the Bellingham case, which was heard both in the Federal Court, as well as in the State court, involving franchise. I think I am correct in saying that in the City of Bellingham—I refer to the case of Puget Sound Power & Light vs. Whatcom County Public Utility District, in 123 Federal 2d, page 286. I don't seem to have another phase of the same case that, I think, was heard in the State court.

I am not unmindful of the urgent and persuasive argument made by counsel regarding the other Federal questions as to the right—particularly as to the right—of the

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Public Utility District to proceed in this case under the franchise or license, and without any consent or permission from the Federal License Commission, but the questions in that were, I think, determined by the Court in the ruling on the demurrer.

I will go back to say that, of course, if the transfer of this property to the Chelan County Public Utitlity District is given finally, it will vest fee title to the real estate held by the Washington Water Power Company, but all it can give, as far as the Federal Government is concerned, will be the transfer of the licenses, subject to all the rights and conditions and limitations that the Federal Government may have under its Federal Power Commission regulations. And I don't know whether that is involved here by any license or franchise it may have in the Town of Chelan and County highways as to rights of way, and so forth. It will not be fee title to the property over which these licenses and franchises give the Washington Water Power Company the right to run lines, but the transfer of the franchise, subject to all the conditions—limitations and conditions—that the licensors or grantors of the franchise have imposed.

I have not been able properly to analyze and discuss as fully as, perhaps, counsel would like, and I made no attempt to analyze and discuss the expert statistical testimony. It seems to me that the questions involved have been questions that could be reached and passed upon pretty much as I have done.

And my decision is that the Chelan County Public Utility District No. 1 is entitled to judgment, giving them the right to proceed with the condemnation, that is, the taking of the works, plants and facilities of the Washington Water Power Company described in the District's petition and in the exhibits attached thereto; and the damage, if any, of the property incident thereto is adjudged a public necessity and for the public use.

If there is nothing else, Court will adjourn.

APPENDIX "D"

RESOLUTION NO. 51

A Resolution establishing a public utility and providing for the acquisition, by purchase or condemnation, of certain works, plants and facilities for the generation, transmission and distribution of electricity, and the construction of certain additions and betterments thereto and extensions thereof, specifying and adopting a system or plan therefor, creating certain special funds, and authorizing the issuance and sale of revenue bonds in an amount not exceeding $10,000,000.00.

Whereas, Public Utility District No. 1 of Chelan County, a duly established municipal corporation of the State of Washington, hereinafter called the District, is authorized under Chapter I, Laws of Washington, 1931, as Amended, to acquire by purchase or condemnation, and to construct and operate a public utility for the purpose of furnishing the District and the inhabitants thereof, and any other person, including public and private corporations, within or without its limits, with electric current for all uses, and, for the purpose of defraying the cost of such public utility and of the plan and system specified and adopted therefor, is authorized to issue and sell utility revenue bonds and to create a special fund or funds for the payment of such bonds and the interest thereon, and

Whereas, the Commission of the District deems it advisable that the District acquire, by purchase or condemnation, and construct and operate such a public utility for such purpose,

Now, Therefore, Be it Resolved by the Commission of the District as follows:

Section 1. The public interest, welfare, convenience and necessity require the establishing by the District of a public utility for the purpose of furnishing the District and the inhabitants thereof, and any other persons, including public and private corporations, within or without its limits, with electric current for all public uses.

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Section 2. The District hereby specifies and adopts the system or plan herein set forth for the purpose aforesaid:

A. The District shall acquire, by purchase or condemnation, the following described electric works, plants and facilities now owned or operated by Washington Water Power Company, a Washington corporation, located in Chelan and Douglas Counties, State of Washington, to-wit:

FIRST

Generating Plants

The electric generating plant of the Washington Water Power Company located in Chelan County and listed below, including powerhouse, dam, reservoir, flumes, raceways, diversion works, head works, waterways, buildings and other works and structures forming a part of or appertaining to said generating plant and station, used or enjoyed or capable of being used or enjoyed in conjunction therewith and all lands of the Company on which same are situated, and all the Company's lands, easements and flowage rights permitting the storage of water for reservoir purposes and the flooding of lands lying along or adjacent to the Chelan River, and Chelan Lake, and the tributaries thereof in the State of Washington, and all other of the Company's real estate and interests therein, rights in respect of or relating to water, machinery, equipment, appurtenances, supplies, franchises, licenses, permits and other rights and other property forming a part of or appertaining to said generating plant and station, used or enjoyed or capable of being used or enjoyed in conjunction therewith.

The Chelan Hydro-Electric Generating Plant, situated on the Chelan River, in Chelan County and that certain license issued by the Federal Power Commission, Project No. 637, Washington, May 8, 1926, expiring May 8, 1976. The total name plate rating of the installed generators is 48,000 kilowatts.

SECOND

Transmission Lines

All of the electric transmission lines of the Washington Water Power Company in Chelan County and those spe-

cifically described in Douglas County, including towers, poles, pole lines, wires, switch racks, insulators and appurtenances, appliances, and equipment and all of the Company's other property, real, personal, or mixed, forming a part of or used, occupied or enjoyed in connection with or in any wise appertaining to said transmission lines or any of them, together with all rights of way, easements, permits, privileges, municipal or other franchises, licenses, consents, and rights for or relating to the construction, maintenance or operation thereof through, over, under or upon any public streets or highways or other lands, public or private. The transmission lines are generally described as follows:

a. The No. 1 Chelan-Stratford single circuit 110 Kv transmission line, extending from the above Chelan Hydro-Electric Generating Plant to and including the last pole or tower and all appurtenances of such pole or tower on the Chelan County side of the Columbia River.

b. The No. 2 Chelan-Stratford single circuit 110 Kv transmission line, extending from the above Chelan Hydro-Electric Generating Plant to and including the last pole or tower and all appurtenances of such pole or tower on the Chelan County side of the Columbia River.

c. The Chelan-Holden single circuit 110 Kv transmission line, extending from the Washington Water Power Company's Chelan Hydro-Electric Plant, in a northwesterly direction, in Chelan County, Washington, for a distance of about 52 miles, to the Howe Sound Company's Mine at Holden, on Railroad Creek near the upper end of Lake Chelan.

d. The Chelan single circuit 110 Kv tie line, extending from the Company's Chelan Hydro-Electric Generating Plant, in a southerly direction in Chelan and Douglas Counties, Washington, for a distance of about 6 miles, to a point in Douglas County where there is an interconnection with a Puget Sound Power & Light Company transmission line, and including all those appurtenances

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of interconnection owned in fee simple or by agreement by the Washington Water Power Company.

e. Any and all transmission facilities owned by the Washington Water Power Company and being in connection with, or useful to, the furnishing of power to the 110 Kv transmission line owned and operated by Okanogan County Public Utility District No. 1.

THIRD

Substations

All substations and substation sites of the Washington Water Power Company, in Chelan County, including all buildings, structures, towers, poles, equipment, appliances and devices for transforming, converting and distributing electric energy, and the lands of the Washington Water Power Company on which the same are situated, and all of the Washington Water Power Company's real estate and interests therein, machinery, equipment, appliances, devices, appurtenances and supplies, franchises, permits and other rights and other property forming a part of said substations or any of them, or used or enjoyed or capable of being used or enjoyed in connection with any thereof, including but not limited to the following:

110-Kv Only

a. Holden Mine Substation—any, and all, of those parts and facilities owned by the Washington Water Power Company.

Other Substations

a. All substations and switching stations and facilities of any voltage classification or description owned by the Washington Water Power Company within or adjacent to the Chelan Hydro-Electric Plant and at any other location or locations within the boundaries of Chelan County not hereinbefore described.

FOURTH

Distribution Systems

All electric distribution lines or systems of the Washington Water Power Company, located in Chelan County, including towers, poles, pole lines, wires, cables, insulators and appurtenances, appliances and equipment, including substations connected to said distribution systems not included above and all of the Washington Water Power Company's other property, real, personal, or mixed, forming a part of or used, occupied, or enjoyed in connection with or in any wise appertaining to said distribution systems or any of them, together with all rights of way, easements, permits, privileges, municipal or other franchises, licenses, consents, and rights for or relating to the construction, maintenances, or operation thereof through, over, under or upon any public streets or highways or other lands, public or private, including, but not limited to, the following:

a. THE LAKESIDE DISTRIBUTION SYSTEM as constructed and equipped in the City of Lakeside in Chelan County.

b. THE CHELAN DISTRIBUTION SYSTEM as constructed and equipped in the City of Chelan in Chelan County.

Notwithstanding the generality of above, the properties to be condemned are also understood to include all electric distribution lines and electric substations of the Washington Water Power Company as constructed and equipped, outside of the incorporated communities above mentioned, within Chelan County.

Included in the distribution system properties to be condemned are any and all parts of only those certain lines located in Douglas County and owned by the Washington Water Power Company as hereinafter specifically described:

a. A nominal 13 Kv line which crosses the Columbia River at two points and which runs generally along the left bank of the river in sections 1, 2, 10, 11 and 12 of T26N, R22E, W.M.

b. A nominal 13 Kv line which crosses the Columbia River at one point and which runs generally along the

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left bank of the Columbia River in sections 9, 16, 20, 21, 29, 31 and 32 in T27N, R23E, W.M. and in section 6, T26N, R23E, W.M.

and serving the town or community of Beebe and areas adjacent thereto, together with all improvements, structures, equipment, transformers, services, meters, appurtenances and accessories thereto.

FIFTH

Miscellaneous Property

All real estate and other physical property owned in fee by the Company and permanently located or fixed in Chelan County, including but not limited to office buildings, warehouses, repair shops, property held for future use, tools and similar equipment, and communication equipment; and any other property fixed or movable, useful or necessary or dedicated principally to the operations of the properties being taken, or any of them, including but not limited to maps, books, records, automotive or power equipment, office equipment and furniture.

Together with all and singular the tenements, hereditaments and appurtenances belonging or in any wise appertaining to the aforesaid property or any part thereof, with the reversion and reversions, remainder and remainders and the tolls, rents, revenues, issues, earnings, income, product and profits thereof, and all the estate, right, title and interest and claim whatsoever, at law as well as in equity, the Company now has or may hereafter acquire in and to the aforesaid property and franchises, leases and consents and every part and parcel thereof.

B. The District shall cause to be made any and all surveys, appraisals, financial and engineering investigations necessary or incidental to the acquisition by purchase or condemnation of the electric works, plants and facilities aforesaid and to the construction of said additions and betterments to and extensions thereof, and the placing of the same into operation, and shall cause to be performed any and all fiscal, engineering, accounting and legal services

necessary or incidental to said acquisition and construction and placing into operation.

The District may modify details of the foregoing system or plan where deemed necessary or advisable in the judgment of the Commission of the District, when not substantially changing the purposes herein specified. Should any part or provision of the foregoing system or plan be held to be invalid, such holding shall not affect the validity of any other portion or provision hereof.

The public utility hereby established and to be acquired by purchase or condemnation or constructed pursuant to the system or plan herein specified and adopted (hereinafter sometimes called the Public Utility) shall consist of the electrical works, plants and facilities hereinabove described together with all additions and betterments thereto and extensions thereof (including all additional works, plants and facilities acquired by the District for the same uses, whether or not physically connected therewith) which may be acquired by purchase or condemnation or constructed by the District after the purchase, condemnation or construction of the works, plants and facilities hereinabove described.

C. The estimated cost of the plan or system herein specified and adopted is declared, as near as may be, to be the sum of ten million dollars ($10,000,000.00).

D. That the gross revenues and proceeds to be derived by the District from the operation of the foregoing electric generating, transmission and distribution works, plants and facilities to be acquired hereunder by purchase or condemnation, including the additions, betterments and extensions herein provided for, at the rates to be charged for the electricity furnished thereby will be sufficient in the judgment of the commissioners of the District to meet all expenses of operation and maintenance, and to permit the setting aside in a special fund, hereinafter created, at the times herein specified, out of the gross revenues of the same, the amounts hereinafter specified to pay the principal of and interest on the bonds hereby authorized to be issued as the same become due and payable, and to create and main-

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tain the reserve account hereinafter created as a part of said special fund.

E. In order to carry out the plan or system herein specified and adopted, the District shall issue and sell its revenue bonds in an amount not exceeding $10,000,000. Said bonds shall bear such date as shall hereafter be fixed by resolution, shall be of the denomination of $1,000 each, shall be numbered from one up, consecutively, and shall mature commencing with the second and ending with the thirtieth year after the date of issue thereof, in such amounts, as near as practicable, as shall, together with the interest on all outstanding bonds, be met by equal annual installments for the payment of the principal and interest on said bonds.

Said bonds shall bear interest not exceeding four & one-half (4½%) percent per annum, payable semi-annually, shall have interest coupons attached to and made a part thereof, shall be payable both as to principal and interest in lawful money of the United States at the office of the Treasurer of the District or at the Fiscal Agency of the State of Washington in the City and State of New York, at the option of the holder, shall be obligations only against the special fund created and established in Paragraph F hereof, and shall be executed in such manner and shall be in such form not inconsistent with law or herewith, both as to the bonds and coupons, as the commissioners of the District hereafter shall prescribe by resolution.

Said bonds shall be registerable as to principal only, and suitable provisions for such registration shall be endorsed thereon.

Said bonds shall be subject to redemption at the option of the District, as the District hereafter shall prescribe by resolution.

F. There shall be and there is hereby created and established, a special fund to be known as the "Serial Electric Revenue Bond Fund, 1945." The District does obligate and bind itself irrevocably to pay into such Fund out of the gross revenues of the public utility herein established and the works, plants and facilities herein provided for, including all additions and betterments to and extensions of

the foregoing now or hereafter purchased, condemned, constructed or otherwise acquired, such amount as may be necessary to pay the principal of and interest on said bonds as the same respectively mature. Such payments shall be made into such fund on the tenth day of each month after the issuance of any bonds hereunder in amounts at least equal to the sum of:

1. A fraction of the payment (less any applicable amounts already in such Fund), to become due for principal on said bonds issued hereunder on the next principal payment date, if any, within one year, and

2. A fraction of the payment (less any applicable amounts already in such Fund), to become due for interest on the bonds, issued hereunder and then outstanding on the next interest payment date.

3. A fraction of the payment (less any applicable amounts already in such Fund), to become due for the Reserve Account of said Fund, hereinafter provided for, for such bonds on the next principal payment date.

In each case, the fraction shall be one, divided by the number of first days of the month prior to such interest payment date or such principal payment date, as the case may be.

During the first year said bonds are outstanding, in lieu of the payments provided for in paragraph 3 above, the District shall pay into the Reserve Account of said Fund an amount equivalent to the difference between the average amounts required in subsequent years to pay the interest on and principal of said bonds, and the amount required the first year of the life of said bonds for interest alone, such payment shall be made in equal monthly installments.

There is hereby created and established in said "Serial Electric Revenue Bond Fund, 1945", a Reserve Account. The District does hereby obligate and bind itself irrevocably to pay annually into such Account in the manner provided in paragraph 3 of this Section, not later than the principal payment date of each year, an amount equal to ten percent (10%) of the total principal and interest requirements of the next ensuing year. Whenever the moneys in said Ac-

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count aggregate an amount equal to the total principal and interest requirements for the next ensuing year, payments thereafter paid into said Account may be used by the District for the purpose of purchasing or redeeming said bonds, or for the purpose of making additions and betterments to and extensions of the electric utility system herein established, including the works, plants and facilities herein provided for, or for any other lawful purpose.

The "Serial Electric Revenue Bond Fund, 1945", created and established hereunder, shall be drawn upon for the sole purpose of paying the principal of and interest on said bonds as the same shall fall due, except that as hereinabove provided, moneys in the Reserve Account in said Fund in excess of an amount equal to interest and principal requirements for the next ensuing year may be used as hereinabove provided, and from and after the date of the issuance of said bonds and so long as any obligations are outstanding against said Fund, the Treasurer of the District shall set aside and pay into said Fund from the gross revenues of the public utility herein established and all of the electric works, plants and facilities of the District, including additions and betterments to and extensions of the foregoing now or hereafter provided for, the amounts hereinabove provided to be paid into said Fund, and said gross revenues are hereby pledged to the payments above specified, which payments shall constitute a charge upon such gross revenues prior and superior to all charges whatsoever. The Treasurer of the District is hereby directed to make payments of the bonds and coupons herein authorized to be issued as the same fall due, from the moneys in said "Serial Electric Revenue Bond Fund, 1945", and from no other source. The payments of said bonds and the coupons thereto attached, as the same fall due, is hereby declared to be the only charge which has been made upon said Fund or which will ever be made thereon until all of said bonds and interest coupons shall have been fully paid. The District hereby covenants and agrees, and the Treasurer of the District is hereby directed, to make Funds available from said Fund to the paying agents for said bonds and coupons at least fifteen

(15) days before interest and principal payments thereon are due.

The Commission of the District hereby declares that in fixing the amounts to be paid into said Fund, as above provided, it has exercised due regard to the costs of operation and maintenance of the public utility herein established and the electric works, plants and facilities to be acquired or constructed hereunder and of the additions and betterments to, and extensions of the foregoing, and that it has not obligated and bound the district to set aside into such special fund a greater amount of the revenues to be derived from the works, plants and facilities to be acquired as herein provided, and the additions and betterments to and extensions thereof, than in its judgment will be available over and above such costs of maintenance and operation.

The District hereby binds itself to maintain and continuously operate in an efficient and economical manner the electric utility of the District, and the works, plants and facilities aforesaid, the additions and betterments thereto and extensions thereof, to keep the same in good repair, and not to sell, lease or in any manner dispose of the electric utility herein established or the works, plants and facilities for the generation, transmission and distribution of electricity to be acquired or constructed hereunder, including any additions and betterments to and extensions thereof which hereafter may be acquired by purchase, condemnation or construction, or any substantial part of any of the foregoing, until all obligations outstanding against, or payable from the special fund hereby created, shall have been paid in full, or in case the District shall sell or dispose of the same before payment of such obligations, it shall not make any sale or disposition without then or theretofore providing that from the proceeds of any such sale or disposal there shall be placed in said special fund a sum sufficient in amount to discharge, and to be used for no other purpose than the discharge, of the principal and interest of all bonds issued hereunder and then remaining unpaid; and it shall not, in any event, sell or dispose of said works, plants or facilities, or any substantial part thereof, for a

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sum less than sufficient to discharge and pay the bonds issued hereunder, and the interest thereon.

The District hereby binds itself to keep such of the works, plants and facilities of the District as are usually insured by corporations operating like properties, insured to the full insurable value thereof in a responsible insurance company or companies against risks, accidents or casualties, against which insurance is usually carried by corporations operating like properties, and that in the event of any loss or damage, the District will repair or reconstruct promptly the damaged portion of the insured property and will apply the proceeds of the insurance policies covering such loss solely for that purpose, or in the event the District should determine not to repair or replace such damaged property, the proceeds of said insurance policy or policies shall be used solely for the purpose of calling and redeeming said bonds or purchasing said bonds at less than the price at which same might be redeemed.

The District further binds itself to keep proper books of account in accordance with rules prescribed by the Division of Municipal Corporations of the State Auditor's office of the State of Washington, or in the event the laws of the State of Washington should fail to provide an agency prescribing rules for keeping said books and records of account, then such books and records of account shall be kept in accordance with the rules prescribed by the Federal Power Commission. The District further agrees that all employees or agencies of the District collection or handling money of the District shall be bonded by a responsible surety company or companies in amounts sufficient adequately to protect the District from loss.

The District further binds itself to establish and maintain rates or charges for the electricity generated, transmitted and distributed by means of the public utility system herein established including all works, plants and facilities to be acquired or constructed as provided herein, and all additions and betterments to and extensions thereof which hereafter may be purchased, condemned or constructed, as will provide sufficient revenues to permit the payment of said sums into such special fund which the District has pledged

to set aside for the payment of principal and interest and for the Reserve Account as herein provided, to be applied to the payment of the principal and interest of the bonds herein authorized until such bonds and interest shall have been paid in full, and in addition thereto, all costs of operation and maintenance.

G. The bonds herein authorized shall be sold in such amounts and at such time or times as the commission of the District by resolution shall direct. The proceeds derived from the sale of said bonds shall be placed in a fund which is hereby created and designated as the "Electric Acquisition Fund, 1945", and said proceeds shall be used solely to paid the costs and expenses of the acquisition by purchase or condemnation of the works, plants and facilities herein provided for, and the construction of the additions and betterments thereto and extensions thereof aforesaid, to pay all costs and expenses in connection therewith and to effectuate the provisions of the plan and system as herein specified and adopted; provided, that any moneys remaining after all expenditures for the purposes above stated have been made shall be transferred and deposited in the "Serial Electric Revenue Bond Fund, 1945", created and established by Paragraph F hereof.

Passed by the Commission of Public Utility District No. 1 of Chelan County this 18th day of October, 1945.

(S.) L. J. Richardson,
President.

Attest:

(S.) W. K. McKenzie,
Secretary Pro Tem.

(Official Seal of Public Utility District No. 1 of Chelan County)

Certificate

I, W. K. McKenzie, do hereby certify that I am the duly elected, qualified and acting Secretary Pro Tem. of Public Utility District No. 1 of Chelan County, Washington, and

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the custodian of its records; that the attached and foregoing is a full, true and correct copy of Resolution No. 51, entitled

"A Resolution establishing a public utility and providing for the acquisition, by purchase or condemnation, of certain works, plants and facilities for the generation, transmission and distribution of electricity, and the construction of certain additions and betterments thereto and extensions thereof, specifying and adopting a system or plan therefor, creating certain special funds, and authorizing the issuance and sale of revenue bonds in an amount not exceeding $10,000,000,"

and that said resolution was adopted by the affirmative vote of a majority of all of the commissioners of said district at their regular meeting held on October 18, 1945, at which a majority of all members of the commission were present; that said resolution has not been altered or amended, and the same is in full force and effect.

In Witness Whereof, I have hereunto set my hand and affixed the official seal of said District this 18th day of October, 1945.

(S.) W. K. McKenzie,
Secretary Pro Tem. of Public Utility District No. 1 of Chelan County.

(Official Seal of Public Utility District No. 1 of Chelan County)

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Supreme Court of the United States

OCTOBER TERM, 1949

NO.....

STATE OF WASHINGTON EX REL. THE WASHINGTON WATER POWER COMPANY, a corporation, CITY FARMERS TRUST COMPANY, a corporation, and RALPH E. MORTON, and CHELAN JOINT SCHOOL DISTRICT NO. 129, a municipal corporation, and TOWN OF CHELAN, a municipal corporation,
Appellants,

vs.

THE SUPERIOR COURT OF THE STATE OF WASHINGTON, FOR CHELAN COUNTY, HONORABLE FRED KEMP, JUDGE,
Appellee.

Appeal from the Supreme Court of the State of Washington.

APPELLANTS' BRIEF ON APPELLEE'S MOTION TO DISMISS APPEAL

ALAN G. PAINE

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Of Counsel

All residing in the State of Washington.

Appellee has interposed a motion to dismiss the appeal as part of its statement made against the jurisdiction of this Court. The motion is based upon two grounds: first, that the judgment of the Supreme Court of the State of Washington is not a final judgment which is appealable to this Court; and second, that no substantial federal question is involved. We believe the facts are set out fully in appellants' jurisdictional statement and appellee's counter-statement, and we will, therefore, confine ourselves to a discussion of the law in this brief.

1. THE JUDGMENT IS A FINAL JUDGMENT AND THEREFORE APPEALABLE

The question simply stated is: Is a judgment of the Supreme Court of Washington affirming a decree of public use and necessity in a condemnation proceeding a "final judgment" within the meaning of Title 28 United States Code, Section 1257(2)? Appellee, in its statement, relies on *Grays Harbor Logging Co. v. Coats-Fordney Logging Co.*, 243 U. S. 251; 61 L. Ed. 702; 37 Sup. Ct. 295. This case was decided in March, 1917, and did hold that such a judgment as involved here was not final and therefore not appealable. The case was decided, we believe, on a misapprehension of the law of the State of Washington as determined by its Supreme Court. The subsequent history of the case bears out our conten-

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tion. After the United States Supreme Court refused to entertain the appeal, the matter of the amount of the award was tried out in the Superior Court for the State of Washington. An award of $2,500.00 was given by the jury. If the property could legally be taken, this was a satisfactory award and no error had been committed in the introduction of evidence or the instructions to the jury. The condemnee tried in two actions to get the matter again before the Supreme Court. In *Coats-Fordney Logging Co. v. Grays Harbor Logging Co.*, 100 Wash. 491; 171 Pac. 241, it appealed from the judgment fixing the amount of the award. The Supreme Court, however, said:

> "The only error assigned is that the Statute upon which the proceeding is based is in violation of the fourteenth amendment to the Federal constitution. That question was determined adversely to the contention of the appellants in *State ex rel. Grays Harbor Logging Co. v. Superior Court*, 82 Wash. 503, 144 Pac. 722. No new argument is presented upon this appeal. This court has uniformly held that an appeal from an award of damages in a condemnation case presents to this court for consideration only the propriety and justice of the award. *State ex rel. McCormick v. Superior Court*, 43 Wash. 97, 86 Pac. 205; *State ex rel. Pagett v. Superior Court*, 46 Wash. 35, 89 Pac. 178; *Whatcom County v. Yellowkanim*, 48 Wash. 90, 92 Pac. 892; *Calispel Diking District v. McLeish*, 63 Wash. 331, 115 Pac. 508.
>
> "No claim is made upon this appeal that the

damages awarded were not sufficient, or that the trial court committed error upon the trial of that question. There is, therefore, nothing for us to consider, unless we review our decision in *State ex rel. Grays Harbor Logging Co. v. Superior Court,* supra. Since the question there considered cannot be raised upon this appeal, it follows that the judgment must be affirmed."

In this decision the Supreme Court of Washington did not pass on any federal question and there was nothing upon which an appeal to this Court could be based. Likewise the judgment was not final in the sense that the litigation was finally terminated, as a decree of appropriation had not yet been entered. This, however, was later done and the condemnee again sought relief in the Supreme Court of Washington.

State ex rel. Grays Harbor Logging Co. v. Sup'r. Ct., 100 Wash. 485, 171 Pac. 238.

However, under the laws of Washington, a decree of appropriation is not appealable and an application for a writ of review and stay of proceedings was sought. The Court recited the history of the litigation up to the hearing in the Supreme Court of the United States and said:

"Thereafter, upon July 2, 1917, the cause having been remitted to the superior court of Grays

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Harbor county, a trial was had before the court and jury upon the question of the damages to be awarded and paid the respondent, the relators here, for the taking and damaging of their lands as described in the petition for condemnation. The jury awarded damages, and judgment was entered thereon in favor of relators in the sum of $2,500 as the value of the lands taken and damages to the remainder. On August 21, 1917, the court made and entered its decree of appropriation in the cause. The relators here have appealed from the judgment of award of the lower court, and have also brought this proceeding for a writ of review, frankly stating that they are seeking, and believe they are entitled to, a review of all three of the judgments heretofore entered in the cause, in order to obtain a final determination so that they can have the question of the constitutionality of the private way of necessity act passed upon by the supreme court of the United States upon a final judgment.

"The act under which the condemnation proceeding was instituted provides that the procedure shall be the same as that provided for the condemnation of private property by railroad companies. Rem. Code, Sec. 5857-2. The method of procedure in condemnation actions by railroad companies is found in Rem. Code, Sec. 921 *et seq.* In considering the provisions of the last act, this court, in the case of *Chicago, Milwaukee & Puget Sound R. Co. v. Slosser,* 82 Wash. 467, 144 Pac. 706, said:

'The statute referred to seemingly contemplates

the entry, during the course of the proceedings, of three separate and distinct judgments; first (by Rem. & Bal. Code, Sec. 925, P. C. 171, Sec. 176), a judgment finding that the contemplated use for which the property is sought to be appropriated is really a public use, and the necessity for its taking for that use; second (by Id. Sec. 926; P. C. 171, Sec. 177), a judgment fixing the amount of the award that is made to the owner of the property appropriated because of the appropriation, both for the property actually taken and for other property damaged thereby; and third (by Id. Sec. 927; P. C. 171, Sec. 178) " . . . a judgment or decree of appropriation of the land, real estate, premises, right of way, or other property sought to be appropriated, thereby vesting the legal title to the same in the corporation seeking to appropriate such land, real estate, premises, right of way, or other property for corporate purposes." '

"An appeal is granted by the statute only from the second of the judgments above referred to, namely, that awarding the damages. Rem. Code, Sec. 931; *Chicago, Milwaukee & Puget Sound R. Co. v. Slosser, supra; North Coast R. Co. v. Gentry,* 58 Wash. 80, 107 Pac. 1059.

'The only method of reviewing the question of the right to take property under the power of eminent domain, that is, the question of use and necessity, is by certiorari or writ of review. *Seattle & M. R. Co. v. Bellingham Bay & E. R. Co.,* 29 Wash. 491, 69 Pac. 1107, 92 Am. St. 907; *What-*

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com County v. Yellowkanim, 48 Wash. 90, 92 Pac. 892; *State ex rel. Pagett v. Superior Court,* 46 Wash. 35, 89 Pac. 178; *State ex rel. Alexander v. Superior Court,* 42 Wash. 684, 85 Pac. 673; *State ex rel. Smith v. Superior Court,* 30 Wash. 219, 70 Pac. 484.

"The only method of reviewing the decree of appropriation, the last of the three judgments above mentioned, if at all, is by certiorari or review. *Chicago, Milwaukee & Puget Sound R. Co. v. Slosser, supra; Olympia Light & Power Co. v. Tumwater Power & Water Co.,* 55 Wash. 392, 104 Pac. 778; *State ex rel. Davis v. Superior Court,* 82 Wash. 31, 143 Pac. 168. Even then we cannot again review the adjudication of necessity, nor review that question at all if it was allowed to become final without review thereof.

"We have held that, upon an error from a judgment awarding damages in a condemnation proceeding, no question can be raised as to the right to condemn, but that the review will be confined solely to the propriety and justness of the amount of damages. *Fruitland Irr. Co. v. Smith,* 54 Wash. 185, 102 Pac. 1031; *North Coast R. Co. v. Gentry, supra; Calispel Diking Dist. v. McLeish,* 63 Wash. 331, 115 Pac. 508; *Seattle, Port Angeles & Lake Crescent R. v. Land,* 81 Wash. 206, 142 Pac. 680; *State ex rel. Davis v. Superior Court, supra.*

"The only question, then, which relators may present to this court upon appeal from the second judgment is that of the adequacy of the damages

awarded, and, for this reason, they contend that, having no appeal from the last judgment, the decree of appropriation vesting the title in the appropriator, they have the right to a writ of review therefrom which would review the original order or judgment of necessity.

"We have uniformly held that the writ of review for the purpose of reviewing the judgment or order of necessity entered in an eminent domain case must be applied for within thirty days from the date of the entry of the judgment. *State ex rel. Lowary v. Superior Court,* 41 Wash. 450, 83 Pac. 726; *State ex rel. Alexander v. Superior Court,* 42 Wash. 684, 85 Pac. 673; *State ex rel. Tumwater Power & Water Co. v. Superior Court,* 56 Wash. 287, 105 Pac. 815.

"The judgment of necessity was entered herein October 15, 1914, and within thirty days thereafter these same relators petitioned this court for a writ of review to review the identical judgment of necessity which it now seeks to have the court again review. At that time this court fully reviewed every question involved in the present application, including the constitutional question, and upheld the judgment of the lower court and the constitutionality of the private way of necessity statute. To issue a writ now would reverse all previous decisions of this court and establish a precedent which would require this court to issue the writ in all subsequent condemnation cases after the decree of appropriation had been made, and again review the judgment of necessity. Without the adjudication and judgment of

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necessity, no subsequent proceedings can be had. As to that, under our system, it is final, subject only to review as provided by law.

"*It seems to us that the supreme court of the United States overlooked our decisions holding that the judgment or order of necessity, under our statutes, is a final judgment.* And it has always been held by that court that constructions of local statutes and of judicial procedure by the court of last resort of a state will be followed by that court. The decree of appropriation is nothing more than a collective judgment, incorporating in it the decree or order of necessity and judgment on the award of the jury. The decree of appropriation vests title in an appropriator upon the condition that the appropriator pays to the owner, or into court for his benefit, the money awarded, and there is nothing to bind or compel the appropriator so to do. He can then waive his right to appropriate and take the land, abandon it, and refuse to pay the money, in which case the owner of the land would retain his land, and the previous judgments and orders would be null.

"For these reasons, the writ of review and stay of proceedings are denied." (Italics ours.)

Here the condemnee had vainly tried to get back into the Supreme Court of Washington to raise the federal question of the constitutionality of the taking, only to be told that the question had been decided before and that the Supreme Court of the United States

had overlooked the decision of the Supreme Court of Washington holding the judgment on the order of public use and necessity was final.

The Supreme Court of Washington has again recently examined condemnation procedure under the laws of the State of Washington in *State ex rel. Northwestern Electric Co. v. Superior Court of Clarke County*, 27 Wash. (2d) 694, 179 Pac. (2d) 510. In this case the Court again holds that in Washington there are three separate and distinct judgments, each of which, subject to proper review by the Supreme Court, is a final judgment. The first is the judgment of public use and necessity in which certiorari will lie as a matter of right since it is a final judgment and not appealable; the second is the judgment of award in which an appeal will lie, but only to correct errors in determining the amount of the award; and third, the decree of appropriation, which is not appealable and certiorari will lie only to correct technical errors in the decree itself. Under the Washington law, therefore, the only time a final decision of the Supreme Court of Washington could be obtained on questions of the legality or constitutionality of the taking would be on the judgment on public use and necessity. In no later proceeding will any federal question be presented or passed on by the Court that would give an opportunity for an appeal to the Supreme Court of the United States.

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The public policy of the State of Washington is clearly to have all legal questions as to the taking of property by eminent domain settled prior to the paying of the compensation. When compensation is paid, title is good in the condemnor and he may take or damage the property with perfect assurance that there is no further liability to the condemnee. The holding in the Grays Harbor case in this Court runs counter to this policy. As well illustrated in this case, such a holding raises some extremely serious and complicated questions. Here the condemnee is a public utility company serving thousands of customers. One of its principal generating plants is sought to be condemned involving, by the condemnor's own estimates, values in excess of $10,000,000. The condemnation award, whatever it may be, is to be raised by the sale of bonds to the public. When the decree of appropriation is entered and the money is paid into Court, the litigation ends, but at that time also the Supreme Court of Washington will refuse to entertain certiorari or stay the proceedings. (*State ex rel. Grays Harbor Logging Co. v. Sup'r. Ct.*, 100 Wash. 485, 171 Pac. 238.) The bonds will have been sold and distributed to the public, possibly non-callable for several years or at high premiums. The property will be taken, the service disrupted, the employees discharged and then, for the first time, does the condemnee have the opportunity for this Court to pass upon the legality of the taking. If the Court should hold the taking

illegal, it would still be impossible to restore all the affected parties to this present position and many would suffer irreparable damage.

We respectfully urge, therefore, that the holding of this Court in *Grays Harbor Logging Co. v. Coats-Fordney Logging Co.*, 243 U. S. 251, 61 L. Ed. 702, 37 Sup. Ct. 295 be reexamined in the light of the subsequent holdings of the Washington Supreme Court, and that the rule laid down in *Richfield Oil Corporation v. State Board of Equalization*, 329 U. S. 69, 91 L. Ed. 80, to the effect

> "That question (the finality of the judgment) will be resolved not only by an examination of the entire record but, where necessary, by resort to the local law to determine what effect the judgment has under the state rules of practice. *Brady v. Terminal R. Asso.* 302 U. S. 678, 688, 82 L. ed. 523, 531, 58 S. Ct. 134, 24; *Brady v. Southern R. Co.*, 319 U. S. 777, 87 L. ed. 1723, 63 S. Ct. 1028. See Boskey, Finality of State Court Judgments under the Federal Judicial Code, 43 Col. L. Rev. 1002, 1005."

We are not unmindful of *Catlin, et al v. United States*, 324 U. S. 229, 65 Sup. Ct. 631, 89 L. Ed. 911, but this case deals not with condemnations generally under state procedures, but with the specific rights to appeal to the federal courts on condemnation proceedings brought by the United States. Congress saw fit to

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provide the United States with the right to take immediate title and possession of condemned property as a matter of public policy and to provide that the legality of taking could be raised only on appeal at the conclusion of the entire case. Congress has undoubted power to do so and its judgment as to what is the best public policy is conclusive. It may well be that in condemnations by the United States it is more important that the United States be able to take immediate title and possession and that the question of the legality of the taking be deferred until the termination of the case, than that the condemnee should have the right to hold up the taking and possession until the question of its legality has been determined. But the public policy of the State of Washington does not so provide in condemnation by private parties or municipal corporations, and that policy should be recognized and followed by this Court.

While not a condemnation suit, we think the recent case of *LaCrosse Telegraph Co. v. Wisconsin Employment Relations Board*, 336 U. S. 18, 93 L. Ed. 265, is in point. In this case the Court, speaking through Mr. Justice Douglas, held that a determination by the Wisconsin Supreme Court upholding a certification by the Wisconsin Employment Relations Board was a final judgment, although it of itself did not command any action but was enforcible in law only by another proceeding. The Court said:

"We assumed in *Allegheny Ludlum Steel Corp. v. Kelley,* 330 U. S., 767, 91 L. Ed. 1234, 67 S. Ct. 1026, that the certification of a collective bargaining representative, sustained by the highest court of the state, was a final judgment, although it did not of itself command action but like the certification here was enforcible in law only by another proceeding.

"We think that is the correct view. The fact that Wisconsin's certification was not in the form of a command is immaterial. See *American Federation of Labor v. National Labor Relations Bd.,* 308 U. S. 401, 408, 84 L. Ed. 347, 351, 60 S. Ct. 300. It was not an abstract determination of status. Nor was it merely an interim adjudication in an uncompleted administrative process. It established legal rights and relationships. It told the employer, subject to judicial review, with whom he could not refuse to negotiate without risk of sanctions. The character of the certification was therefore such as to make it reviewable under the appropriate standards for exercise of the federal judicial power."

So here the judgment is not merely an interim adjudication. It establishes finally the legal rights and relationships between the parties and determines definitely the right of the appellee to take appellants' property subject only to paying the compensation to be fixed.

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2. THERE IS A SUBSTANTIAL FEDERAL QUESTION INVOLVED

We do not believe this is the place to discuss the case on its merits, but that it is sufficient to point out the substantial nature of the questions raised. The opinion of the Supreme Court of Washington in *State ex rel. The Washington Water Power Company v. Superior Court of Chelan County,* 134 Wash. Dec. 179, clearly sets up the federal questions involved. The case was presented to the Court en banc and the opinion, (copy of which is attached to the jurisdictional statement) was by a divided Court seven to two, two Justices dissenting upon the ground that the state statutes involved were repugnant to the federal constitution and laws, so there is an indication that at least some of the Justices of the Supreme Court thought the question substantial.

The question briefly stated is: Can a local municipal corporation which is unregulated by any state authority acquire a hydroelectric property which has been built under a federal license on either government land or using the navigable waters which belong to the Nation as a whole free from regulation by the Federal Power Commission representing the Nation as a whole and commit itself by binding agreements with its bond holders to fix and maintain rates which may be so unreasonably high as to deprive the con-

sumers of the benefits to which they are entitled, Vol. 41, United States Statutes at Large, Sec. 19, p. 1073, Sec. 812, Title 16 U. S. C. A. of the Federal Power Act provides:

> "As a condition of the license, every licensee under this chapter which is a public-service corporation, or a person, association, or corporation owning or operating any project and developing, transmitting, or distributing power for sale or use in public service, shall abide by such reasonable regulation of the services to be rendered to customers or consumers of power, and of rates and charges of payment therefor, as may from time to time be prescribed by any duly constituted agency of the State in which the service is rendered or the rate charged. That in case of the development, transmission, or distribution, or use in public service of power by any licensee under this chapter or by its customer engaged in public service within a State which has not authorized and empowered a commission or other agency or agencies within said State to regulate and control the services to be rendered by such licensee or by its customer engaged in public service, or the rates and charges of payment therefor, or the amount or character of securities to be issued by any of said parties, it is agreed as a condition of such license that jurisdiction is hereby conferred upon the commission, upon complaint of any person aggrieved or upon its own initiative, to exercise such regulation and control until such time as the State shall have provided a commission or other

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authority for such regulation and control: *Provided,* That the jurisdiction of the commission shall cease and determine as to each specific matter of regulation and control prescribed in this section as soon as the State shall have provided a commission or other authority for the regulation and control of that specific matter. June 10, 1920, c. 285, Sec. 19, 41 Stat. 1073."

The first sentence provides that licensees that are public service corporations shall abide by state regulation. This was intended to remove any question that a public service corporation which was a federal licensee thereby became an instrumentality of the federal government and immune to state regulation. It was, of course, not necessary to include in this category licensees which were municipal corporations, as a municipal corporation would not be in any sense considered as an instrumentality of the federal government. The next sentence, however, provides "That in case of the development, transmission or distribution, or use in public service of power by *any licensee under this chapter* * * * within a State which has not authorized and empowered a commission or other agency or agencies within said State to regulate and control the services to be rendered by such licensee * * * or the amount or character of securities to be issued by any of said parties, it is agreed as a condition of such license that jurisdiction is hereby conferred upon the commission, * * * ." (Italics ours.) Here

it is to be noted that the restriction is not limited to licensees that are public service corporations, but it includes all licensees. This is sound public policy. If a small municipality, wholly unregulated, is free to appropriate power sites on our great navigable rivers and use them exclusively for its own local benefit, such use would be inconsistent with the broad purposes of the Act to provide for the beneficial and economic development of the water resources of the Nation for the benefit of the people as a whole.

The further question was raised as to the right of an assignee to take over a license on different terms than those contained in the original license. The Supreme Court of Washington, in passing on this question said:

> "We are not unmindful of Sect. 801 of the Act which provides:
>
> > ' . . . any successor or assign of the rights of such licensee, whether by voluntary transfer, judicial sale, foreclosure sale, or otherwise, shall be subject to all the conditions of the license under which such rights are held by such licensee and also subject to all the provisions and conditions of this chapter to the same extent as though such successor or assign were the original licensee under this chapter: . . . '
>
> "We feel that the above section would bind the

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district as to provisions such as a limitation on the amount of water to be appropriated, etc., but that it would not give the commission the power to regulate rates of a municipality. It would bind the assignee only as to those provisions to which it could have been subjected had the assignee been the original licensee, and if such a licensee is a municipality, the commission has no authority to regulate its rates."

The law makes no such distinction as the Supreme Court of Washington reads into it, and the interpretation of this section is important and substantial, and should be definitely determined by this Court.

The Supreme Court of Washington held squarely that the appellee was not subject to state regulation, but that it was also not subject to regulation by the Federal Power Commission. It also held squarely that the binding agreement made between the Public Utility District and its bond holders to fix and maintain rates was not violative of Section 803 (h), Title 16 U. S. C. A., 45 United States Statutes at Large, Sec. 206, page 842. When more and more of the federal power sites fall into municipal hands, it becomes of increasing importance to determine whether the municipal licensees are empowered to operate their plants free of regulation by both state and federal regulatory bodies. This question is not only substantial, but is one that is demanding of an early determination and is squarely presented to this Court in this case.

We respectfully request, therefore, that the motion to dismiss be denied and that in any event the question of jurisdiction be deferred until the argument of the case on its merits.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 555

STATE OF WASHINGTON, EX REL. THE WASHINGTON WATER POWER COMPANY, ET AL.,
Appellants,

vs.

THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR CHELAN COUNTY, HONORABLE FRED KEMP, JUDGE

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

STATEMENT OF APPELLEE MAKING AGAINST JURISDICTION AND MOTION TO DISMISS APPEAL

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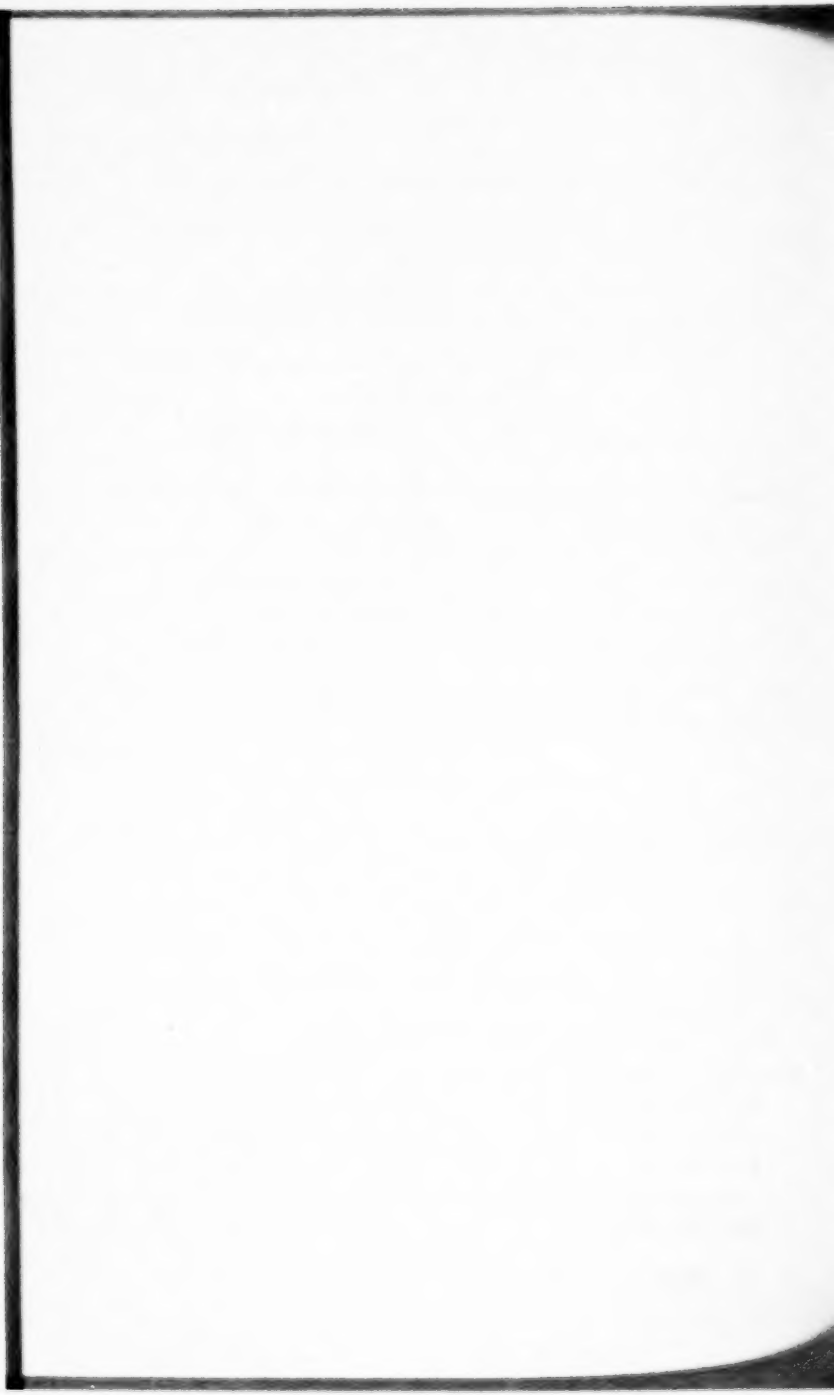

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 555

STATE OF WASHINGTON EX REL. THE WASHINGTON WATER POWER COMPANY, A CORPORATION, CITY FARMERS TRUST COMPANY, A CORPORATION, AND RALPH E. MORTON, AND CHELAN JOINT SCHOOL DISTRICT NO. 129, A MUNICIPAL CORPORATION, AND TOWN OF CHELAN, A MUNICIPAL CORPORATION,

Appellants,

vs.

THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR CHELAN COUNTY, HONORABLE FRED KEMP, JUDGE,

Appellee

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

STATEMENT OF APPELLEE MAKING AGAINST JURISDICTION AND MOTION TO DISMISS APPEAL

---

1. Appeal Is Not from a Final Judgment

On October 30, 1945, Public Utility District No. 1 of Chelan County, Washington, instituted an eminent domain

proceeding in the Superior Court of Chelan County to condemn public utility property owned by The Washington Water Power Company and located in Chelan and Douglas Counties, in the State of Washington. Pursuant to a hearing thereon, and on November 19, 1948, The Honorable Fred Kemp, Judge of the said Superior Court, made and entered a decree of public use and necessity adjudging the contemplated taking of said property to be necessary and the contemplated use thereof to be a public use.

The appellants here thereafter applied to the Supreme Court of the State of Washington for a writ of review from the decree of public use and necessity. A writ of review was granted and on July 21, 1949, the Supreme Court of the State of Washington filed an opinion declaring the judgment of the trial court to be correct and affirming the decree of public use and necessity. A rehearing having been applied for and denied, judgment of the Supreme Court of the State of Washington was entered on the 6th day of September, 1949, affirming the Judgment of the trial court in entering the decree of public use and necessity. Appellants seek an appeal to this Court under Title 28, United States Code, Section 1257 (2) from said judgment.

REMINGTON'S REVISED STATUTES, Section 11610, 1945 Supplement, grant to public utility districts the right of eminent domain and require that it be exercised and instituted pursuant to resolution of the commission and conducted in the same manner and by the same procedure as is or may be approved by law for the exercise of the power of eminent domain by incorporated cities and towns in the State of Washington in the acquisition of utility properties.

REMINGTON'S REVISED STATUTES, Section 9217, provides that whenever an ordinance has been passed by a state legislative authority, the carrying out of which will require

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that property be taken or damaged for a public use, such city shall file a petition in the superior court of the county where the property sought to be condemned is situated, praying that just compensation shall be ascertained for the property to be so taken or damaged.

REMINGTON'S REVISED STATUTES, Section 9219, provides that upon the filing of a petition for the taking or damaging of property by a city or town, a summons, returnable as summons in other civil actions, shall be issued and served upon the person made parties defendant, together with a copy of the petition.

REMINGTON'S REVISED STATUTES, Section 9221, provides that upon the return of the summons the court shall proceed to the hearing of said petition and shall impanel a jury to ascertain the just compensation to be paid for the property taken or damaged.

REMINGTON'S REVISED STATUTES, Section 9230, provides that any final judgment rendered by the court upon any finding of the jury, or upon findings of the court if a jury be waived, shall be lawful and sufficient condemnation of the property taken or damaged, upon the payment of the amount of such findings; such judgment is final as to the damages caused by reason of the taking or damaging of the property unless appealed from and no such appeal shall delay the taking or damaging of the property if the amount of the judgment and costs is paid into court for the owners and parties interested.

REMINGTON'S REVISED STATUTES, Section 9231, provides that upon proof that just compensation has been paid into court, the court shall enter an order that the city or town shall have the right at any time thereafter to take possession of or damage the property, and thereupon, the title to any property so taken shall be vested in fee simple in such city or town.

It thus appears that under the statutes of the State of Washington, an eminent domain proceeding such as is here involved is divided into three parts: first, a proceeding to obtain a decree of public use and necessity; secondly, a proceeding to ascertain the just compensation to be paid for the taking or damaging of the property; and, lastly, the entry of a decree of appropriation upon payment into court of the award for the taking or damaging of the condemnee's property.

The leading case in this Court relating to the finality of judgments in condemnation cases is *State of Washington ex rel. Grays Harbor Logging Co.* v. *Superior Court of Washington for Chehalis County*, 243 U. S. 251, 61 L. Ed. 702, 37 Sup. Ct. 295, which is reported by the Official Reporter under the title of "Grays Harbor Logging Co. vs. Coats-Fordney Logging Company." In this case the Court held that a decree of public use and necessity under the same Washington Statutes and Constitution here involved was not a final judgment within the meaning of Section 237, Judicial Code (now 1257, Judicial Code). Referring to such condemnation proceeding under the statutes of Washington, this Court said:

> "In this state of the local practice it is argued that the judgment that has been entered should be regarded as finally disposing of a distinct and definite branch of the case, and therefore subject to our review as a final judgment; leaving the ascertainment of the compensation and damages to be dealt with as a separate branch of the case. Wheeling & B. Bridge Co. *v.* Wheeling Bridge Co., 138 U. S. 287, 290, 34 L. ed. 967, 968, 11 Sup. Ct. Rep. 301, is cited in support of this contention, and certainly seems to lend color to it. But, notwithstanding the decision in that case, we cannot regard a condemnation proceeding taken under the authority of the Constitution of Washington and the Act of 1913 as severable into two distinct branches.

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The Constitution forbids that the property be taken without compensation first made or ascertained and paid into court for the owner, and of course, in case of controversy, compensation cannot be made to the owner until the amount of it has been ascertained. It follows that the judgment entered by the superior court to the effect that petitioner was entitled to condemn and appropriate the land in question for its right of way must be construed as being subject to a condition that the proper compensation be first ascertained and paid." (p. 705.)

"When the litigation in the state courts is brought to a conclusion, the case may be brought here upon the Federal questions already raised as well as any that may be raised hereafter; for although the state courts, in the proceedings still to be taken, presumably will feel themselves bound by the supreme court (82 Wash. 503), as laying down the law of the case, this court will not be thus bound (United States *v.* Denver & R. R. G. R. Co., 191 U. S. 84, 93, 48 L. ed. 106, 109, 24 Sup. Ct. Rep. 33; Messenger *v.* Anderson, 225 U. S. 436, 444, 56 L. ed. 1152, 1156, 32 Sup. Ct. Rep. 739; Coe *v.* Armour Fertilizer Works, 237 U. S. 413, 418, 59 L. ed. 1027, 1029; 35 Sup. Ct. Rep. 625). (p. 706.)

The question of finality of state court judgment under the Federal Judicial Code is the subject of a carefully and well written article in 43 Columbia Law Review, 1002, from which we can not do better than to quote:

"The soundness of this decision (referring to the Grays Harbor case) is hardly open to question. A condemnation proceeding is a unitary lawsuit which if successful will terminate in a money award. A ruling that the taking is authorized and not barred by constitutional restraints may forever resolve that question, so far as the state courts are concerned, but it does not finally dispose of the controversy any more than the controversy in a negligence case is ended by a ruling that the action is not barred by the statutes of limitations. In the subsequent hearing on assessments of

> damages, new federal questions could arise, which would force the Supreme Court to review the case piecemeal if it were to assume jurisdiction upon a mere order for condemnation. Or the award may turn out to be so generous that the condemnee will gladly accept it and drop the litigation, so that the Supreme Court will never be called upon to render a decision. Accordingly, the Court has consistently applied the Grays Harbor doctrine to all condemnation cases." (p. 1007.)

A very recent case which cites and follows the doctrine of the *Grays Harbor* case is *Catlin et al.* v. *United States*, 324 U. S. 229, 65 Sup. Ct. Rep. 631. In this case a condemnation proceeding was instituted in the District Court under War Purposes Act of 1917 and the Declaration of Taking Act. Pursuant thereto the Secretary of War filed a declaration and deposited in court a sum of money as the estimated compensation for the lands. The court thereupon entered judgment decreeing that title had vested in the United States and declaring the right of just compensation, and holding the cause open for further "orders, judgments, and decrees." The condemnees moved to vacate and dismiss the original petition. Upon denial of the motion, an appeal was taken from the order denying the motion to vacate and dismiss and from the "judgment" on the declaration of taking. On the appeal this Court held that the decision was not a final one within the meaning of Section 128 of the Judicial Code, saying (p. 633-634):

> "Their right to appeal rests upon Section 128 of the Judicial Code. This limits review to "final decisions" in the District Court. A "final decision" generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment. St. Louis I. M. & S. R. R. *v.* Southern Express Co., 108 U. S. 24, 28, 2 S. Ct. 6, 8, 27 L. Ed. 638. Hence, ordinarily in condemnation proceedings appellate review may be had only upon an order or judgment disposing of the whole case, and adjudicating all rights,

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including ownership and just compensation, as well as the right to take the property. This has been the repeated holding of decisions here. The rule applies to review by this Court of judgments of state courts, in advance of determination of just compensation, although by local statute "judgments of condemnation," i. e., of the right to condemn particular property, are reviewable before compensation is found and awarded. Wick *v.* Superior Court, 278 U. S. 574, 49 S. Ct. 94, 73 L. Ed. 515; Id., 278 U. S. 575, 49 S. Ct. 94, 73 L. Ed. 515; Public Service Co. of Indiana *v.* City of Lebanon, 305 U. S. 558, 59 S. Ct. 84, 83 L. Ed. 352; Id., 305 U. S. 671, 59 S. Ct. 143, 83 L. Ed. 435; cf. Dieckmann *v.* United States, 7 Cir., 88 F. 2d 902. The foundation of this policy is not in merely technical conceptions of "finality." It is one against piecemeal litigation. "The case is not to be sent up in fragments • • •." Luxton *v.* North River Bridge Co., 147 U. S. 337, 341, 13 S. Ct. 346, 358, 37 L. Ed. 194. Reasons other than conservation of judicial energy sustain the limitation. One is elimination of delays caused by interlocutory appeals."

The most recent decision of this Court holding that it will not review a state court's judgment until the litigation has been finally concluded is *Republic Natural Gas Co.* v. *State of Oklahoma,* 334 U. S. 62, 68 Sup. Ct. Rep. 972, which was decided May 3, 1948. The appeal was taken to this Court from a judgment of the Supreme Court of Oklahoma affirming an order of Oklahoma's Corporation Commission directing Republic Natural Gas Co. to take gas ratably from a gas well of applicant, Peerless Oil and Gas Company in one of three ways, but leaving open for later determination in event of failure to reach agreement, the terms upon which Republic must take the gas, the rates which it must pay on purchase, or may charge if it sells as agent of Peerless. In holding that the judgment was not final the Court said:

"No self-enforcing formula defining when a judgment is "final" can be devised. Tests have been indicated which are helpful in giving direction and emphasis to decision from case to case. Thus, the requirement of finality has not been met merely because the major issues in a case have been decided and only a few loose ends remain to be tied up—for example, where liability has been determined and all that needs to be adjudicated is the amount of damages. Bruce *v.* Tobin, 245 U. S. 18, 38 S. Ct. 7, 62 L. Ed. 123; Martinez *v.* International Banking Corp., 220 U. S. 214, 223, 31 S. Ct. 408, 411, 55 L. Ed. 438; Mississippi Central R. Co. *v.* Smith, 295 U. S. 718, 55 S. Ct. 830, 79 L. Ed. 1673. On the other hand, if nothing more than a ministerial act remains to be done, such as the entry of a judgment upon a mandate, the decree is regarded as concluding the case and is immediately reviewable. Board of Commissioners *v.* Lucas, 93 U. S. 108, 23 L. Ed. 822; Mower v. Fletcher, 114 U. S. 127, 5 S. Ct. 799, 29 L. Ed. 117.

"But a decision that a taking by eminent domain is for a public use, where the amount of compensation has not been determined, is not deemed final, certainly where the property will not change hands until after the award of compensation. Grays Harbor Logging Co. *v.* Coats-Fordney Logging Co., 243 U. S. 251, 37 S. Ct. 295, 61 L. Ed. 702; cf. Luxton *v.* North River Bridge Co., 147 U. S. 337, 13 S. Ct. 356, 37 L. Ed. 194; Catlin *v.* United States, 324 U. S. 229, 65 S. Ct. 631, 89 L. Ed. 911."

It will be noted that in this case a minority of the Court dissented on the ground that the asserted analogy to the Grays Harbor, Catlin, and Luxton cases did not hold because of entirely different situations presented, but thereby nevertheless indicating adherence to the rule of lack of finality in cases involving condemnation.

As we understand appellants, they concede that this Court has held in the *Grays Harbor Logging Co.* v. *Coats-*

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Fordney Logging Co., 243 U. S. 251, 61 L. Ed. 702, 37 Sup. Ct. Rep. 295, and other cases, that a decree of publics use and necessity in an eminent domain proceeding under the Washington statutes and constitution is not a final judgment within the meaning of Section 1257 of the Judicial Code, but contend that the rule therein announced does not control here because of the decisions in *State ex rel. Northwestern Electric Co., et al.* v. *Superior Court*, 27 Wash. (2), 694, and *Thomas J. Brady* vs. *Terminal Railroad Association of St. Louis*, 302 U. S. 678, 82 L. Ed. 523, 58 Sup. Ct. Rep. 134.

The *Northwestern Electric Co.* case, *supra*, holds that an order of public use and necessity becomes final unless review be taken to the state supreme court and that review may be had only by certiorari, there being no statute allowing an appeal. However, this Court in the *Grays Harbor* case, *supra*, in construing the identical statutes and constitution of Washington relating to condemnation, refused to regard the decree of public use and necessity as a final judgment subject to review, but construed it as being subject to a condition that the proper compensation be first ascertained and paid. In respect to the contention that the Washington state court treated the order of public use and necessity as final, this Court stated (p. 706): "When the litigation in the state court is brought to a final conclusion, the case may be brought here upon the Federal question already raised as well as any that may be raised hereafter; for although the state courts, in the proceedings still to be taken, presumably will feel themselves bound by the decision heretofore made by the supreme court (82 Wash. 503), as laying down the law of the case, this court will not be thus bound * * *."

The appellants mistake the meaning of *Thomas J. Brady* v. *Terminal Railroad Association of St. Louis*, 302 U. S.

678, 82 L. Ed. 523, 58 Sup. Ct. Rep. 134, *supra*. In that case the Supreme Court of Missouri, in upsetting a verdict for the plaintiff, held that no case sufficient to go to a jury had been proved under either the Federal Safety Appliance Act or the state common law. The judgment of the Missouri Supreme Court specified that the trial court's judgment be "reversed", without stating whether a new trial should, or could, be had. Accordingly the petition for certiorari was at first denied "as it does not appear from the record that there is a final judgment." A petition for rehearing called attention to a line of decision in Missouri establishing that where the highest court of the state entered a judgment of "simple reversal", no possibility of further proceedings existed other than the ministerial act of filing the judgment in the court below. The court accordingly granted certiorari, "it appearing that the judgment of the Supreme Court of Missouri is a final judgment under the decisions of that Court cited by petitioner in his petition for rehearing." (See 43 Columbia Law Review 1002 (p. 1005)). As pointed out by the author of the Article in the Columbia Law Review, *supra*, the case established the power of the Supreme Court to inquire into local practice in order to ascertain what actual effect the judgment may have under state law. In other words, if state rules of practice impart to the judgment a finality in effect that is lacking in appearance this Court may properly make inquiry. This does not mean, however, that the label affixed to the judgment by state law can settle whether the judgment is final under Section 1257 of Title 28 of the United States Code. The Court will consider state law in order to ascertain the incidents and effect of a particular judgment; once having done so, it must then apply its own criteria of finality, and not the state court's, as is illustrated by the leading case of *Grays Harbor Logging Co.* v. *Coats-Fordney Logging Co.*, hereinbefore cited.

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2. This Appeal does not involve any substantial Federal question.

As a further ground for opposing the jurisdiction of the United States Supreme Court in this appeal, we contend that no substantial Federal question is involved.

Title 28, United States Code, Section 1257 (2) provides:

> "1257. State Courts—Appeal—Certiorari
>
> Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (1) • • •
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

Admittedly the Supreme Court of Washington did sustain the validity of certain statutes which appellants have contended were repugnant to those of the United States, but such an allegation alone is not sufficient in itself to confer jurisdiction. In determining jurisdiction the character of the question must be considered. *Equitable Life Assurance Society* v. *Brown*, 187 U. S. 308, 311, 23 Sup. Ct. Rep. 123, 47 L. Ed. 190.

One of the statutes of the state of Washington involved is Remington's Revised Statutes, Section 11610-d, 1945 Supplement, which authorized public utility districts to sell electric current for all uses.

> "• • • with full and exclusive authority to sell and regulate and control the use, distribution, rates, services, charges, and price thereof free from the jurisdiction and control of the Director of Public Works and the Division of Public Utilities."

This statute was the basis for resolution No. 51, by which Public Utility District No. 1 of Chelan County authorized the issuance of revenue bonds to finance the acquisition of the properties and bound itself to establish and maintain rates sufficient to provide for retirement of the bonds and all costs of operation of the properties.

Appellants maintain that the Washington statute above cited in so far as it authorizes a public utility district to issue revenue bonds containing covenants by the district to maintain rates adequate to retire said bonds in connection with the condemnation of a Federal licensed power project is repugnant to Vol. 41, United States Statutes at Large, Sec. 19, p. 1073, U. S. C. A. Title 16, Sec. 812, on the theory that this section confers jurisdiction on the Federal Power Commission to regulate and control the rates and charges of a district which becomes the transferee of a Federal license. We believe that even a casual reading of Section 812 of the Federal Power Act and of other sections of the Act defining the terms used in Section 812, clearly shows that a public utility district, being a 'municipal corporation', is exempt from rate regulation by the Federal Power Commission, and therefore the Washington statutes involved in this proceeding are in no wise repugnant to Section 812. The entire Federal Power Act is contained in Sections 791 through 825, U. S. C. A. Title 16, and in the interest of brevity we will cite the Act by section number.

Under Section 812 of the Act only the following classes of licensees are subject to regulation by the Federal Power Commission:

> "As a condition of the license, every licensee under this chapter which is a *public-service corporation*, or a person, association, or corporation owning or operating any project and developing, transmitting, or distributing power for sale or use in public service, shall

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abide by such reasonable regulation of the services to be rendered to customers or consumers of power, and of rates and charges of payment therefor, as may from time to time be prescribed by any duly constituted agency of the State in which the service is rendered or the rate charged. That in case of the development, transmission, or distribution, or use in public service of power by any licensee under this chapter or by its customer engaged in public service within a State which has not authorized and empowered a commission or other agency or agencies within said State to regulate and control the services to be rendered by such licensee or by its customer engaged in public service, or the rates and charges of payment therefor, or the amount or character of securities to be issued by any of said parties, it is agreed as a condition of such license that jurisdiction is hereby conferred upon the commission, upon complaint of any person aggrieved or upon its own initiative, to exercise such regulation and control until such time as the State shall have provided a commission or other authority for such regulation and control: *Provided*, That the jurisdiction of the commission shall cease and determine as to each specific matter of regulation and control prescribed in this section as soon as the State shall have provided a commission or other authority for the regulation and control of that specific matter." (Italics curs.)

Section 796 (3) of the Act defines "corporations" as follows:

"(3) 'corporation' means any corporation, joint-stock company, partnership, association, business trust, organized group of persons, whether incorporated or not, or a receiver or receivers, trustee or trustees of any of the foregoing. *It shall not include* 'municipalities' as hereinafter defined;" (Italics ours.)

Section 796(7) defines "municipality" as follows:

"(7) 'municipality' means a city, county, irrigation district, drainage district, or *other political subdivision*

> or agency of a State competent under the laws thereof to carry on the business of developing, transmitting, utilizing, or distributing power;" (Italics ours.)

Section 797(e) authorizes the commission:

> "To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, *or to any State or municipality* for the purpose of constructing, operating, and maintaining dams, * * *" (italics ours.)

Section 807 expressly reserves:

> "* * * the right of the United States or any State or municipality to take over, maintain, and operate any project licensed under this chapter at any time by condemnation proceedings upon payment of just compensation. * * *"

A public utility district is a municipal corporation, Remington's Revised Statutes, Section 11606, providing:

> "Municipal corporations, to be known as public utility districts, are hereby authorized for the purposes of this act and may be established within the limits of the State of Washington, as provided herein."

We therefore submit that it was not the purpose or intention of the Congress, under Section 812, to confer jurisdiction upon the Federal Power Commission to regulate rates of licensees which are municipalities, and that the Washington statutes are not repugnant to Section 812 of the Act.

In addition to Section 812 of the Act, appellants urge that the Washington statutes involved in the condemnation action are also repugnant to Section 803(h) of the Federal Power Act. Section 803(h) reads as follows:

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"(h) That combinations, agreements, arrangements, or understandings, express or implied, to limit the output of electric energy, to restrain trade, or to fix, maintain or increase prices for electric energy or service are hereby prohibited."

In this connection, appellants argue that the covenant in the district's bond resolution binding the district to maintain rates adequate to retire the bonds and pay all costs of operation is "a combination to fix, maintain, or increase prices for electric energy" within the meaning of this section.

No cases involving Section 803(h) have been cited by appellants, and our research has failed to reveal any. Apparently, the statute has never been invoked. This statute is a part of the original Federal Power Act enacted in 1920, and during the almost thirty years of its existence no occasion has arisen which would require its application. And this notwithstanding the fact that during those years the development of power resources was handled primarily by private power companies. At least one reason which would suggest itself is the existence of rate controlling bodies such as the Federal Power Commission for those utilities subject to its jurisdiction, and the Public Service Commissions of the states for those not subject to the Federal Power Commission.

We believe that a sufficient answer to this contention of appellants is contained in the decision of the Supreme Court of the State of Washington which is the subject of this appeal, and from which we quote:

"As grounds for its contention that the proposed bond-issue contract is "repugnant to the laws of the United States", the company relies upon Section 803(h) which provides:

"'(h) Combinations, agreements, arrangements, or understandings, express or implied, to limit the out-

put of electrical energy, to restrain trade, or to fix, maintain, or increase prices for electrical energy or service are hereby prohibited.' "

"That section was enacted for the sole purpose of prohibiting monopolistic combinations, agreements, etc. It is the 'anti-trust' section. For example, an agreement by The Washington Water Power Company, the Puget Sound Power & Light Company, and the Chelan P. U. D. to limit the output of electrical energy, or to restrain trade, or to fix, maintain, or increase prices for electrical service to the detriment of consumers would be prohibited. But it was not the intention of the provision in question to prohibit an agreement between the district and its bondholders that the district would maintain rates to pay the principal and interest of the bonds. Furthermore, as we have stated previously, by becoming the assignee, the district does not *ipso facto* become subject to jurisdiction by the commission. Admitting *arguendo*, that the commission could exercise jurisdiction to regulate rates, there is nothing in the record that 'upon complaint of any person aggrieved or upon its own initiative', the commission will ever exercise such regulation, or that it would not take into consideration the cost of operation and also the cost of purchasing the facility."

State ex rel. Washington Water Power Co. *v.* Sup. Ct. for Chelan County, Vol. 134 Wn. Dec. 179, 187.

It will be borne in mind that the only statutes of the United States which appellants contend are contravened by the statutes of Washington are the two sections of the Federal Power Act, i.e., Section 812 and Section 803(h). (See pages 5 and 6 of Appellants Statement as to Jurisdiction). Therefore, unless the Washington statutes are repugnant to those two sections of the Federal Power Act, no substantial Federal question is involved in this appeal and this Court is without jurisdiction to review the judgment of the Supreme Court of Washington. We respectfully

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submit that we have pointed out in this brief that the Washington statutes are in no wise repugnant to the Federal statutes to which attention has been directed, and that no substantial Federal question is presented.

In conclusion appellee moves this Court that this appeal be dismissed on the grounds and for the reasons herein set forth, i.e., (1), The Order of Public Use and Necessity appeal is not from a final judgment, and (2), No substantial Federal question is involved.

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No. 555. WASHINGTON EX REL. WASHINGTON WATER POWER CO. ET AL. *v.* SUPERIOR COURT OF WASHINGTON FOR CHELAN COUNTY ET AL. Appeal from the Supreme Court of Washington. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *Alan G. Paine* and *H. E. T. Herman* for appellants. *David M. Wood* and *Sam R. Sumner* for appellees. Reported below: 34 Wash. 2d 196, 208 P. 2d 849.